Supreme Court, U.S.
FILED

96 678 OCT 28 1996

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1996

DAVID D. BENNETT,

Petitioner,

v.

LAW FIRM OF JONES, WALDO, HOLBROOK & McDONOUGH and CHRISTOPHER L. BURTON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DALE F. GARDINER
Counsel of Record
PATRICIA A. O'RORKE
O'RORKE & GARDINER, LLC
6995 Union Park Center, Suite 470
Midvale, Utah 84047
Telephone: (801) 569-3131

R. PRIYA SESHACHARI
Taft Securities Litigation
1200 Clay Street, Suite 15
San Francisco, California 94108
Telephone: (415) 922-1832

Counsel for Petitioner, David D. Bennett

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

102 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the Fifth Amendment Due Process Clause and/or Federal Rule 23(c)(2) protect a Utah resident "opt out" of a Federal Rule 23(b)(3) federal securities class action in California, from the later issuance of a "Bar Order" enjoining the opt out from bringing unlitigated claims against his Utah lawyers in a Utah court?

2. Does the First Amendment Free Speech and Redress Clause prohibit a federal court, which approved a class action settlement, from anticipatorially imposing a prior restraint Bar Order on a client opt out to enjoin him from "initiating or maintaining any lawsuit . . . which in any way involves . . . counsel's legal services . . . " against the lawyers who represented him and who were later certified to also represent the class?

3. Does an Article III current case or controversy exist when, years after a settlement judgment is entered, class counsel themselves, without approval of any former class settlement representative, and without filing a complaint, seek a Bar Order injunction preventing a Utah resident opt out from bringing unlitigated claims for breach of the Utah lawyers' contractual and fiduciary duties?

4. Does a California federal district court that entered a judgment approving a securities class action settlement have, years later, *in personam* and subject matter jurisdiction to enjoin a Utah resident opt out from bringing an action in a Utah state court for breach of a

QUESTIONS PRESENTED FOR REVIEW – Continued

Utah retainer agreement under Utah law against Utah lawyers who represented him and later also the class?

5. Does the policy of the Anti-Injunction Act (28 U.S.C. § 2283) staying federal injunctions of state court proceedings, rightly deter a federal court from enjoining a pending state court proceeding when a state court complaint has not been filed but it is represented by the party seeking an injunction that a complaint is ready to be filed?

6. Does a California Federal Magistrate have initiating authority or jurisdiction to issue a Temporary Bar Order injunction across state lines without notice, hearing, or security as implicitly "AFFIRMED" by the Court of Appeals in an unpublished Memorandum disposition such that the appellate decision is beyond scrutiny and review; or are these judicial actions so far a departure from the usual course of judicial proceedings as to call for the exercise of this Court's supervisory power under Supreme Court Rule 10(a)?

PARTIES TO THE PROCEEDING

The Petitioner is David D. Bennett ("Mr. Bennett"), a Utah resident and a former client of the Respondent. Mr. Bennett was the Appellant of a Bar Order injunction below. The Respondents are the Utah Law Firm of Jones, Waldo, Holbrook & McDonough and one of its attorneys, Christopher L. Burton (collectively the "Utah Lawyers" or "Bennett's Former Lawyers"). They were the Appellees below.

Mr. Bennett retained the Utah Lawyers to represent him in a federal securities class action which was transferred to the Southern District of California and styled, *David D. Bennett, James W. Bennett, Loraine J. Engstrom, Mo-Vest Limited, Harold Sandbeck, Arden Lubeck, Franklin Reed Bennett, Sarah Liu and Alice Liu, individually and on behalf of Gen Probe Incorporated stockholders similarly situated v. Thomas H. Bologna, Thomas H. Adams, Howard C. Birndorf, Malin Burnham, Brook H. Byers, David F. Hale, Charles M. Hartman, Lewis H. Sarett, David E. Kohne, Gen Probe Incorporated, a Delaware corporation, Chugai Acquisition U.S.A., Inc., a Delaware corporation, Chugai Holding U.S.A., Inc., a Delaware corporation, and Chugai Pharmaceutical Company Limited, a Japanese corporation* (hereinafter referred to as "*Bologna* Class Action"). Bennett opted out of this class litigation which was settled in 1992. In 1994, without filing a complaint, the Utah lawyers brought an *ex parte* motion in the settled class action to restrain Bennett from suing them. They initially characterized themselves as "Attorneys for Plaintiffs (Except David D. Bennett)," but when each of the named class

PARTIES TO THE PROCEEDING – Continued

plaintiffs individually objected to the lawyers' *ex parte* motion, they characterized themselves as "Counsel for Class Counsel." Therefore, the real parties in interest to this proceeding are Mr. Bennett and the Utah Lawyers.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES viii

OPINIONS BELOW 2

JURISDICTION 2

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

I. Basis For Federal Jurisdiction In The Court Of First Instance 3

II. Facts Material To Consideration Of The Questions Presented 3

REASONS FOR GRANTING THE WRIT 10

I. The Ninth Circuit's Memorandum Decision Raises Related Compelling Questions Of United States Constitutional And Federal Law That Have Not Been But Should Be Settled By This Court. (Rule 10(c)) 10

A. Whether The Fifth Amendment Due Process Clause And/Or Federal Rule 23 Preclude A Federal Class Action Court From Later Imposing An Injunction On A Class Opt Out Is An Important Unsettled Question That Should Be Decided By This Court 10

TABLE OF CONTENTS – Continued

Page

B. Whether The First Amendment Free Speech And Redress Clause Prohibits A Court From Anticipatorially Imposing A Prior Restraint Bar Order Injunction On A Class Opt Out Is An Important Unsettled Question Of Federal Law Which Should Be Decided By This Court..... 13

C. Whether Class Counsel, Without Filing A Complaint And Without The Approval Of The Former Class Representatives, Have Standing Under The Article III Case Or Controversy Clause To Seek An Injunction Prohibiting A Class Opt Out From Bringing Unlitigated Claims Against Counsel Is An Important Unsettled Question Of Federal Law Which Should Be Decided By This Court..... 14

D. Whether A Class Settlement Court Has Jurisdiction To Issue An Injunction Over A Class Opt Out Is An Important Unsettled Question Of Federal Law Which Should Be Decided By This Court..... 16

E. Whether The Policy Of The Anti-Injunction Act Applies To Pending But Not Filed State Court Proceedings Is An Important Unsettled Question Of Federal Law Which Should Be Decided By This Court..... 17

II. The Ninth Circuit's Memorandum Decision Decides Important Underlying Questions Of Federal Law In Ways That Conflict With Relevant Decisions Of This Court. (Rule 10(c))... 20

A. The Memorandum Decision Implicitly Decides The Due Process Issue In A Way That Conflicts With Relevant Decisions Of This Court..... 20

TABLE OF CONTENTS – Continued

Page

B. The Memorandum Decision Ignores The First Amendment And Fifth Amendment Issues In A Way That Conflicts With Relevant Decisions Of This Court 20

C. The Memorandum Decision Decides The Class Court Jurisdictional Issue In A Way That Conflicts With Relevant Decisions Of This Court 21

III. The Ninth Circuit's Memorandum Decision Conflicts With The Decisions Of The United States Courts Of Appeal For The Third, Fifth And Sixth Circuits On The Same Important Matters. Rule 10(a)) 23

A. The Memorandum Decision Conflicts With A Recent First Amendment Decision Of The United States Court Of Appeals For The Sixth Circuit 23

B. The Memorandum Decision That A Federal Class Court Has Jurisdiction To Issue A Bar Order Injunction Over A Class Opt Out, Conflicts With Decisions Of The United States Courts Of Appeal For The Third And Fifth Circuits 24

IV. The Ninth Circuit's Unpublished Memorandum Disposition Is A Departure From The Usual Course Of Judicial Proceedings And An Acquiescence In A Magistrate's Departure So Far From The Usual Course Of Judicial Proceedings As To Call For The Exercise Of The Supreme Court's Supervisory Power. (Rule 10(a)) 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Amalgamated Clothing Workers of Am. v. Richman Bros. Co., 348 U.S. 511 (1955) 17

In re Asbestos Litig., 90 F.3d 963 (5th Cir. 1996) 10

Ashley v. City of Jackson, 464 U.S. 900 (Mem. Dec. 1983) (Rehnquist, J., dissenting), *reh'g denied*, 464 U.S. 1003 (1983) 16

Atlantic Coastline R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) 17

Bankers Trust Co. v. Old Republic Insurance Co., 7 F.3d 93 (7th Cir. 1993) 28

Barancik v. Investors Funding Corp., 489 F.2d 933 (7th Cir. 1973) 18

Barlow v. Collins, 397 U.S. 157 (1970) 15

Browder v. Director of Ill. Dept. of Corrections, 434 U.S. 257 (1978) 29

California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 13

Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175 (1968) 24

In re Center Wholesale, Inc., 759 F.2d 1440 (9th Cir. 1985) 27

Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) 17

Commissioner of Internal Revenue v. McCoy, 484 U.S. 3 (1987), *reh'g denied*, 484 U.S. 982 (1987) 1

In re Corrugated Container Antitrust Litig., 756 F.2d 411 (5th Cir. 1985) 25

TABLE OF AUTHORITIES – Continued

Page

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 331 (1980) 15

Dombrowski v. Pfister, 380 U.S. 479 (1965) 18, 19

Dugas v. American Surety Co., 300 U.S. 414 (1937) 23

Durkin v. Shea & Gould, 92 F.3d 1510 (9th Cir. 1996) ..8, 21

Epstein v. MCA, Inc., 50 F.3d 644 (9th Cir. 1995), *rev'd*, 116 S. Ct. 873 (1996) 22

F.T.C. v. Standard Oil Co. of Cal., 449 U.S. 232 (1980) 7

Fulton County Nat'l Bank of Atlanta v. Hozier, 267 U.S. 276 (1925) 22

Gentile v. State Bar of Nev., 501 U.S. 1030 (1991) 20

In re Glenn W. Turner Enterprises Litig., 521 F.2d 775 (3rd Cir. 1975) 24

Granny Goose Foods, Inc. v. Brotherhood of Teamsters, 415 U.S. 423 (1974) 26

Hansberry v. Lee, 311 U.S. 32 (1940) 11

Honey v. Goodman, 432 F.2d 333 (6th Cir. 1970) 18

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), *reh'g denied*, 421 U.S. 971 (1975) 17

Jones, Waldo, Holbrook & McDonough v. Dawson, 298 Utah Adv. Rep. 8 (1996) 8

Kokkonen v. Guardian Life Ins. of Am., 511 U.S. 375 (1994) 14, 22

Local Loan Co. v. Hunt, 292 U.S. 234 (1934) 21

TABLE OF AUTHORITIES – Continued

Page

Martin v. Wilks, 490 U.S. 755 (1989), *reh'g denied*, 492 U.S. 932 (1989) 11

Matsushita Elec. Indus. Co., Ltd. v. Epstein, 116 S. Ct. 873 (1996) 16, 21

McDonald v. Smith, 472 U.S. 479 (1985) 13

N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 13

Near v. Minn., 283 U.S. 697 (1931) 14

New York Times Co. v. United States, 403 U.S. 713 (1971) 14

NLRB v. A-Plus Roofing, Inc., 39 F.3d 1410 (9th Cir. 1994) 27

Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97 (1987) 12, 13

In re Pacific Enterprises Securities Litig., 47 F.3d 373 (9th Cir. 1995) 21, 27

Peacock v. Thomas, 116 S. Ct. 862 (1996) 22, 23

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 11, 12, 15, 20, 21

Preiser v. Newkirk, 422 U.S. 395 (1975) 15

Proctor & Gamble Co. v. Bankers Trust, Co., 78 F.3d 219 (6th Cir. 1996) 23, 24

In re Real Estate Title & Settlement Services Antitrust Litig., 869 F.2d 760 (3rd Cir. 1989), *cert. denied*, 493 U.S. 821 (1989) 12

Rizzo v. Goode, 423 U.S. 362 (1975) 15

Roth v. Bank of the Commonwealth, 583 F.2d 527 (6th Cir. 1978), *cert. denied*, 442 U.S. 925 (1979) 18

TABLE OF AUTHORITIES – Continued

Page

In re Rules of the U.S. Ct. of App. for the Tenth Circuit, 955 F.2d 36 (10th Cir. 1992) 28

Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994) 1

Tonnesen v. Yonkers Contracting Co., 847 F. Supp. 12 (E.D. N.Y. 1994) 28

Union Oil Co. v. Minier, 437 F.2d 408 (9th Cir. 1970) 18

United Mine Workers of Am. Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) 13

United States v. Johnson, 319 U.S. 302 (1943) (per curiam) 14

United States v. Microsoft, 56 F.3d 1448 (D.C. Cir. 1995) 28

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III 1, 2, 6, 14, 15

U.S. Const. amend. 1 ..... 1, 13, 18, 20, 21

U.S. Const. amend. 5 ..... 1, 2, 20, 21

STATUTES CITED

28 U.S.C. § 455 28

28 U.S.C. § 636 ..... 2, 6, 25, 27, 30

28 U.S.C. § 1254 2

28 U.S.C. § 1367 ..... 2, 3, 7

28 U.S.C. § 1651 ..... 2, 3

28 U.S.C. § 2106 11

28 U.S.C. § 2283 2

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

U.S. S. Ct. Rule 10 .....10, 20, 23, 25, 29

Fed. R. Civ. P. 23.....10, 11, 23

Fed. R. Civ. P. 65.....24, 25, 26, 27, 30

Rules of the Ninth Circuit 36-1 through 36-3.....2, 28

William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981)..... 28

Maximillian A. Grant, *The Right Not To Sue: A First Amendment Rationale For Opting Out Of Mandatory Class Actions*, 63 U. CHI. L. REV. 239 (1996) 13

Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 WASHBURN L.J. 155 (1992)..... 29

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

The United States Court of Appeals for the Ninth Circuit ruled that a federal district court which approved a class settlement had jurisdiction over an opt out years later to enjoin him from "initiating or maintaining any lawsuit" against the opt out's former lawyers "which in any way involves . . . counsel's legal services" performed in the class action. That decision raises compelling constitutional questions under the Fifth Amendment Due Process Clause, the First Amendment Free Speech and Redress Clause, and the Article III Case or Controversy Clause, as well as important federal questions under the Anti-Injunction Act and the All Writs Act.

This is a case of first impression.[1] No other federal Court of Appeals has ever upheld a district court's jurisdiction over a securities class opt out to enjoin or condition the opt out's right to pursue his individual state law claims in a state court. The Court of Appeals' decision also overlooked the irregular and unlawful proceedings which resulted in the injunction.

Petitioner David D. Bennett respectfully prays that a writ of certiorari issue to review the Memorandum decision[2] of the United States Court of Appeals for the Ninth

---

[1] In *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994), the Court granted certiorari to review whether an un-named class member had a constitutional Due Process right to opt out of a federal class action for money damages. The court subsequently determined that certiorari was improvidently granted because the factual setting in *Ticor* may have required resolution of a hypothetical question. That factual problem does not exist in the case at bar.

[2] The fact that the decision is unpublished carries no weight in the decision of whether to grant certiorari. *Commissioner of Internal Revenue v. McCoy*, 484 U.S. 3, 7 (1987).

Circuit entered in this case on June 14, 1996, rehearing denied July 30, 1996.

OPINIONS BELOW

The Memorandum disposition of the United States Court of Appeals for the Ninth Circuit was designated "not appropriate for publication and may not be cited to or by the courts of this [Ninth] circuit. . . . " A copy of the decision is attached as App. *infra* 1-4. It affirmed the district court's jurisdiction to enter a Bar Order injunction (as construed by the Ninth Circuit) over the class opt out. A copy of the unpublished Bar Order injunction is attached as App. *infra* 13-18.

JURISDICTION

The Memorandum decision was entered on June 14, 1996. App. *infra* 1-4. The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing en banc on July 30, 1996. App. *infra* 34-35. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent constitutional and statutory provisions are:

U.S. Const. art. III § 1

U.S. Const. amend. V

The Supplemental Jurisdiction Statute, 28 U.S.C. § 1367

The All Writs Act, 28 U.S.C. § 1651

The Anti-Injunction Act, 28 U.S.C. § 2283

Magistrate Jurisdiction and Powers, 28 U.S.C. § 636(b)(1)(A)

Ninth Circuit Rules 36-1 through 36-3

Copies are in the Appendix *infra* 36-40.

STATEMENT OF THE CASE

I. Basis For Federal Jurisdiction In The Court Of First Instance.

The federal district court incorrectly relied on 28 U.S.C. § 1367 supplemental jurisdiction and 28 U.S.C. § 1651 ("courts may issue all writs . . . agreeable to the usages and principles of law") to enter a Bar Order enjoining a class opt out from suing his former lawyers who were also class counsel. App. *infra* 19-20.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed that the district court had jurisdiction to enter the prior restraint injunction over the opt out "to preserve and protect the 'fruits and advantages' of its [class settlement] judgment" from which Mr. Bennett opted out. App. *infra* 2-3.

II. Facts Material To Consideration Of The Questions Presented.

This Petition seeks review of the Court of Appeals' unpublished ruling that the federal district class court had jurisdiction to enter an injunction over a class opt out. Prior to this case at bar, no federal Court of Appeals has upheld a district court's jurisdiction to permanently enjoin an opt out. The permanent prior restraint injunction restricted the opt out's right to sue his Utah lawyers for breach of contractual and fiduciary duties under Utah law in a Utah state court.

David D. Bennett ("Mr. Bennett") was the sole original named plaintiff in a derivative and class action filed on behalf of Gen Probe, Inc.'s minority public shareholders against Gen Probe, Inc. and its directors. After Mr. Bennett filed the complaint, he (and later eight of his friends and relatives) signed a Retainer Agreement with the Utah law firm of Jones Waldo Holbrook &

McDonough to represent him in the litigation.[3] Christopher L. Burton was assigned as lead counsel. The law firm and Burton are collectively hereinafter referred to as the "Utah Lawyers" or "Bennett's Former Lawyers." The name of the case was changed from *David D. Bennett v. Gen-Probe, Inc., et al.* to *Bennett, et al. v. Bologna, et al.*,

---

[3] Some of the terms of the Retainer Agreement were ethically questionable and all of the following were a basis for disagreement among the lawyers and the named clients during the course of the lawyers' representation and thereafter:

Paragraph 1 stated, in part, "Law Firm shall have authority to make all decisions relating to the prosecution of the lawsuit in its absolute discretion." This was qualified by Paragraph 13 that "no settlement of clients' causes of action shall be binding without the consent of Clients and Law Firm."

Paragraph 3: "Law Firm agrees to pay all costs. . . . "

Paragraph 13: "In the event Clients terminate this Retainer Agreement . . . Law firm shall be entitled to the lesser of the contingency fee described in Paragraph 2 herein [33.4%] or three times the costs advanced by Law Firm to the date of the termination of this Retainer Agreement plus a pro rata share of the fee (exclusive of a recovery of costs advanced) agreed by Clients to be paid to successor counsel. . . . "

Paragraph 14: "Law Firm has agreed to enter into this Retainer Agreement in part upon its understanding that the lawsuit will be prosecuted as a shareholder derivative action and not as a class action."

Paragraph 19: "In any action brought to enforce this Retainer Agreement, Law Firm and Clients agree that the Third Judicial District Court of Salt Lake County, State of Utah, shall have jurisdiction and venue. . . . "

Paragraph 21, in part: "Any modification of this Retainer Agreement or additional obligation assumed by any party to this Retainer Agreement shall be binding only if in writing signed by each party or by an authorized representative of each party."

District Court No. 90-1183-G, after the Utah lawyers erroneously dropped Gen-Probe, Inc. as the principal defendant and venue was transferred from Utah to the Southern District of California.

Prior to the federal court certifying the class for settlement purposes and the court's approval of a class settlement, Mr. Bennett disagreed with the Utah lawyers' unilateral decisions to drop (and never re-serve) Gen-Probe, Inc. as a cornerstone defendant; to eliminate all derivative claims including § 16(b) insider trading claims; and to change the definition and nature of the recovering class plaintiffs thereby greatly diluting the per share recovery of the remaining minority shareholders. Gen-Probe, Inc. was nonetheless protectively included in the settlement and a part of the recovery was "allocated" to the dropped derivative claims. Mr. Bennett was impugned by the lawyers for his opposition which included that they should not receive a maximum fee. He timely opted out of the class litigation and took nothing from the class litigation. The final judgment approving the class settlement expressly acknowledged that Bennett submitted a valid request for exclusion, and stated that Bennett was "not bound by this judgment." App. *infra* 5, 9, 12.

Approximately two years later, after the class action case was settled and closed, the Utah Lawyers, without filing a Complaint, submitted *in camera*, without any attempt at prior notice, an "*Ex parte* Motion" to the same federal magistrate who had earlier excluded Mr. Bennett from the class litigation and the class settlement. The Magistrate granted the motion for an anticipatory Temporary Bar Order injunction.[4] App. *infra* 13-15.[5] The Tempor-

---

[4] Revealed to the Court of Appeals in a Motion to Supplement the Record in April 12, 1995, page 2 was the Utah Lawyers' admission that "[C]ounsel did not file the draft [legal malpractice] complaint with a motion for a bar order but rather

ary Bar Order restrained Mr. Bennett from bringing any claims against the Utah Lawyers for anything they did or did not do "which in any way involves" the class action. The order immunized the lawyers from any and all malpractice claims brought by Mr. Bennett or members of the class.

The California federal magistrate issued the Temporary Bar Order injunction, without notice or hearing. The Order was served at 9:00 p.m. on July 5, 1994. It directed that Mr. Bennett "may file (and shall personally serve) any opposition papers by 4:00 p.m. on July 7, 1994," something Bennett, a Utah resident, could not feasibly do within 43 hours. App. *infra* 15. The magistrate lacked statutory authority to issue the injunction. 28 U.S.C. § 636(b)(1)(A): "a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, *except a motion for injunctive relief. . . .* " (emphasis added).

Thereafter, the federal district judge ignored the Utah Lawyers' lack of standing to bring a current case or controversy under Article III in the class action court. When Mr. Bennett's counsel later presented letters from each of the named class representatives objecting to the Utah Law Firm's self-serving motion (*see* App. *infra* 46), the federal court's response was, "so what . . . that's tough." App. *infra* 46.

The federal district judge also did not hold an evidentiary hearing to adjudicate whether the Utah Lawyers

---

offered to provide the court with a copy of the draft complaint for *in camera* inspection. Prior to the September 6, 1995 [sic] hearing on the Permanent Bar Order, Judge Judith N. Keep requested Class Counsel to provide her with a copy of the draft complaint, with which Class Counsel complied." See page 19 *infra*.

[5] "Bar Order" is not a statutory term. On appeal the Ninth Circuit construed the Bar Order as an injunction.

would suffer any irreparable injury if an injunction did not issue.[6] Instead, the district court reasoned that, there was "no harm, no foul," to the client opt out being enjoined, hence the Temporary Bar Order injunction should be made permanent. The court concluded that Mr. Bennett could not challenge the way the Utah Lawyers conducted the class litigation. Later, the district court stated, "this [Bennett's state court lawsuit] is the most ridiculous lawsuit I have ever seen."

The district court did not identify its *in personam* or subject matter jurisdiction to maintain the Bar Order injunction. The judge simply explained later, "the court exercised supplemental jurisdiction pursuant to 28 U.S.C. § 1367," App. *infra* 21 and "the third exception to the Anti-Injunction Act . . . to protect the *res judicata* effect of their judgments."[7] App. *infra* 52. However, the district court never did explain how an opt out suing his former lawyers years later could possibly threaten the class settlement judgment.

Mr. Bennett appealed the Bar Order injunction and then in accordance with his written Retainer Agreement and the court's statement that "He has a right to pursue his individual claims,"[8] filed his legal malpractice complaint in a Utah state court on December 30, 1994. Bennett's Utah Complaint, as amended, alleged that the Utah Lawyers' misconduct in the class action litigation breached the lawyers' retainer agreement with him, breached the lawyers' fiduciary duties to him, amounted

---

[6] The prospect of litigation expense "does not constitute irreparable injury." *E.g., F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980).

[7] The Court's last explanation of relying on the Anti-Injunction Act is inconsistent with the Court's earlier explanation that the Court relied only on 28 U.S.C. § 1367. Compare App. *infra* 21 with App. *infra* 52.

[8] App. *infra* 33.

to malpractice as to him, and was an intentional infliction of emotional distress upon him.[9]

To avoid answering the Utah complaint and to thwart the state court proceedings, the Utah Lawyers filed a contempt motion in the California federal district court and a motion in the Utah court to stay proceedings until the federal proceeding was determined. Subsequently, the California federal district court declared Mr. Bennett and his counsel in contempt of the Bar Order injunction.[10] It ordered Bennett to amend his Utah complaint and demanded the deletion of over 100 paragraphs containing factual allegations that the Law Firm inadequately represented Mr. Bennett throughout the class litigation. The court directed the Utah Lawyers' counsel to provide a transcript to "Judge Medley in Utah so that he is clear that I am not allowing or saying that the State of Utah has a right to attack . . . class counsel's representation or any of the other allegations that I find violate a final judgment of the federal district court." App. *infra* 53. The federal district court did not acknowledge the Utah judiciary's important interest in interpreting and regulating retainer agreements entered into between Utah attorneys and Utah clients. *E.g., Jones, Waldo, Holbrook & McDonough v. Dawson*, 298 Utah Adv. Rep. 8, 10-14 (Utah Sept. 6, 1996).

---

[9] On August 19, 1996, a different Ninth Circuit panel held that a class settlement does not bar an action for legal malpractice *by a party* to the settlement. *Durkin v. Shea & Gould*, 92 F.3d 1510, 1518 (9th Cir. 1996): "In short, we hold that a court approved shareholder derivative settlement pursuant to Rule 23.1 does not immunize participating attorneys from subsequent malpractice actions."

[10] Bennett's appeal and his counsels' appeal of the Contempt Orders are now pending before the United States Court of Appeals for the Ninth Circuit. The opening briefs were filed in July of 1996.

On appeal of the Bar Order injunction, the court of appeals reasoned that the district court had jurisdiction to enter the Bar Order injunction, and held: "the bar order cannot be construed to prevent Bennett from litigating issues in his malpractice and breach of contract actions that relate to class counsels' handling of the class action so long as such litigation does not undermine the finality of class action judgment. The order, as so construed, is therefore AFFIRMED." App. *infra* 3-4.

Mr. Bennett's timely petition for rehearing and a suggestion for rehearing en banc questioned the Court's affirmance and jurisdiction to continue the constraint. In the petition, Bennett again emphasized: that no continuing jurisdiction extends to class opt outs; *res judicata* and collateral estoppel do not apply to an opt out; and a federal court does not have supplemental jurisdiction to enforce or protect a litigation settlement against someone who was no longer a party to the litigation and who was not a party to the settlement. On July 30, 1996, the United States Court of Appeals for the Ninth Circuit denied the petition for rehearing and the suggestion for en banc review. App. *infra* 34-35. Bennett now seeks review in the United States Supreme Court of the court of appeals' ruling upholding the federal district class court's jurisdiction to enter an anticipatory injunction over a class opt out.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Memorandum Decision Raises Related Compelling Questions Of United States Constitutional And Federal Law That Have Not Been But Should Be Settled By This Court. (Rule 10(c))

A. Whether The Fifth Amendment Due Process Clause And/Or Federal Rule 23 Preclude A Federal Class Action Court From Later Imposing An Injunction On A Class Opt Out Is An Important Unsettled Question That Should Be Decided By This Court.

No other federal court of appeals has ever upheld a permanent injunction, even conditionally, over a class opt out. An important unsettled question of federal law that should be decided by the Supreme Court is whether a prior restraint injunction can ever, consistent with Due Process and Federal Rule 23, be imposed on a Rule 23(b)(3)[11] class opt-out.[12] Federal Rule 23 provides that if a class action member does not exclude himself he will be bound by a class settlement judgment and implies that if a class member excludes himself by opting out, he will not be bound. However, instead of being guided by Rule 23, the court of appeals in the case at bar muddled and contradicted the rule's unstated premise that one who opts out will not be bound. The Ninth Circuit's Memorandum construed the Bar Order injunction differently than the district court, yet in a single final word "AFFIRMED"

---

[11] "Opt out class actions were unheard of before the 1966 amendments to the Federal Rule of Civil Procedure created the Rule 23(b)(3) opt out class action." *In re Asbestos Litig.*, 90 F.3d 963, 987 n.16 (5th Cir. 1996). Rules 23(b)(3) and (c)(2) are presumed constitutional. *Id.*

[12] This issue was raised in Bennett's Appellate Court Brief. *See* the Brief's Table of Contents App. *infra* 52-54.

the injunction over the class opt out[13] and the district court's jurisdiction to enter the Bar Order injunction.

As a general principle, no one is bound *in personam* to a judgment in litigation to which he is not a party. *Martin v. Wilks*, 490 U.S. 755, 761 (1989). A limited exception to this general principle is the class or representative suit. Class members are governed by a class decree so long as they are adequately defined and the procedure adopted fairly insures the protection of the interests of absent parties. *Hansberry v. Lee*, 311 U.S. 32, 41-44 (1940). In a state class action, this Court held that a class member has a Due Process right to be provided an opportunity to remove himself from the class, and ruled that once a class member opts out "he is removed from the litigation entirely."[14] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810-811 (1985). Indeed, the opportunity to opt out is necessary to establish jurisdiction over a class plaintiff that lacks minimum contacts with the federal forum. *Id.* What remains unresolved is whether a federal securities class opt out has a Due Process right or a right under Federal Rule 23 to be free of the continuing control and surveillance of a settling federal court.

Another unresolved question of federal law warranting certiorari is, "what minimum contacts are required for a federal district court to later exercise personal jurisdiction over an out-of-state opt out?" In *Phillips Petroleum Co.*, the court explained that the "burdens" a forum

---

[13] The Memorandum disposition is not only inconsistent with Rule 23 but is also inconsistent with 28 U.S.C. § 2106 which calls for a disjunctive determination, affirming, modifying, vacating, setting aside or reversing the judgment.

[14] The *Shutts* court further declared, "[W]e hold that, Due Process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an opt out or request for exclusion form to the Court." *Shutts*, 472 U.S. at 812.

places upon an absent class action plaintiff are not of the same order or magnitude as those it places upon an absent defendant. *Phillips Petroleum Co.*, 472 U.S. at 808. Therefore, notice to a class plaintiff and an opportunity to opt out complies with Due Process. In contrast, Due Process requires minimum contacts with the forum before a federal court can exercise personal jurisdiction over an individual out-of-state plaintiff or defendant. *Id.* As further explained in *Omni Capital Int'l v. Rudolf*, 484 U.S. 97, 104 (1987):

> The requirement that a court have personal jurisdiction flows not from Article III, but from the Due Process Clause. . . . It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. There also must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant.

Moving to opt out is not that consent. *E.g., In re Real Estate Title and Settlement Services Antitrust Litig.*, 869 F.2d 760, 770 (3rd Cir. 1989), *cert. denied*, 493 U.S. 821 (1989).

Mr. Bennett started out as a named class plaintiff in Utah. Subsequently, venue was transferred to California and Bennett ultimately opted out of the class action. Years later, the same magistrate who ruled that Bennett was not bound by the final judgment approving the class settlement, nevertheless enjoined him from suing his Utah Lawyers for breach of contractual and fiduciary duties. The District Court placed the same burdens on Bennett as are placed on individual out-of-state defendants. By enjoining Mr. Bennett, the court compelled Bennett to defend himself in California against an overly broad and wrongful injunction at great personal cost over years of time. *Cf. Phillips Petroleum Co.*, 472 U.S. at 808. However, once Bennett opted out, his minimum contacts with the federal forum ceased. Consequently, the district court's

acts are contrary to the sense of *Omni* and squarely raise the issue of what minimum contacts are required for a federal district court to later exercise personal jurisdiction over an out-of-state opt out.

B. Whether The First Amendment Free Speech And Redress Clause Prohibits A Court From Anticipatorially Imposing A Prior Restraint Bar Order Injunction On A Class Opt Out Is An Important Unsettled Question Of Federal Law Which Should Be Decided By This Court.

Mr. Bennett's right to petition for redress of grievances is cut from the same cloth as the other First Amendment guarantees of freedom of expression. *McDonald v. Smith*, 472 U.S. 479, 482 (1985). The First Amendment protects vigorous advocacy. *N.A.A.C.P. v. Button*, 371 U.S. 415, 429 (1963). Access to a court of competent jurisdiction is one aspect of the First Amendment right to petition for redress of grievances. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Further, the right to petition a court for redress is among the most "precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of Am. Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). Moreover, Bennett's right to opt out and be free of the class court's injunctive power is a necessary corollary of the First Amendment right to engage in litigation as protected expression and right of association. Maximillian A. Grant, *The Right Not To Sue, A First Amendment Rationale For Opting Out of Mandatory Class Actions*, 63 U. CHI. L. REV. 239, 247 (1996).

Yet, without so much as filing a complaint, the Utah Lawyers obtained a federal injunction anticipatorily

restraining Mr. Bennett from bringing an expected lawsuit against the Utah Lawyers in a Utah court.[15] This Court has never upheld a prior restraint of a First Amendment protected right. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); *Near v. Minn.*, 283 U.S. 697, 713-16 (1931). Once it is determined that someone has a right to opt out of the class litigation, and if in fact he opts out, he should not thereafter be subject to restraining injunctions, *a fortiori* if they are anticipatory injunctions. Thus, this case presents the important but unsettled question of whether the First Amendment prohibits a federal class court from anticipatorily imposing a prior restraint Bar Order injunction upon an opt out who seeks to bring unlitigated claims against his former lawyers.

C. Whether Class Counsel, Without Filing A Complaint And Without The Approval Of The Former Class Representatives, Have Standing Under The Article III Case Or Controversy Clause To Seek An Injunction Prohibiting A Class Opt Out From Bringing Unlitigated Claims Against Counsel Is An Important Unsettled Question Of Federal Law Which Should Be Decided By This Court.

A case or controversy requires that parties in litigation be adverse. *E.g., United States v. Johnson*, 319 U.S. 302, 303-04 (1943) (per curiam). This Court has identified only three interests sufficient to create a case or controversy under Article III in the context of a class action: first, the personal interest of a named class plaintiff; second, the

---

[15] The Utah Lawyers may have refrained from filing a complaint pleading because it would have required them to identify a basis for jurisdiction independent of the class action. *Kokkonen v. Guardian Life Ins. of Am.*, 511 U.S. 375 (1994).

interest of the named class plaintiffs in representing the putative class, *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 331, 326 (1980); and third, the interest of a class defendant. *Phillips Petroleum Co.*, 472 U.S. at 805, 806. In the case at bar, all of these interests were resolved by the class action settlement judgment. Further, Bennett had no interest in the class action because he opted out and thus excluded himself from the class litigation. He did not take or receive any benefits from the class settlement.

This Court should grant certiorari and resolve that the Utah Lawyers (non-parties and not protected by the terms of the court-approved settlement) who fashioned the class settlement do not have a personal stake in the federal class action to invoke the judicial power of the federal class court to enjoin an opt out (another non-party to the settlement) from bringing unlitigated claims against them.[16] Further, the Utah Lawyers should not be able to institute an Article III case or controversy without filing a complaint showing an invasion of a legally protected interest[17] and warranting injunctive relief. The filing of a federal Complaint is the ordinary and usual trigger for an Article III case or controversy.

---

[16] The Utah Lawyers, certainly upon their certification along with the named class representatives, were supposed to represent the class interest. However, seeking and obtaining the restraining order years later only served the lawyers personal interest. A personal interest, different than the interest of class members, does not create an Article III case or controversy in a class action court. *See Rizzo v. Goode*, 423 U.S. 362, 373 (1975).

[17] *Barlow v. Collins*, 397 U.S. 157, 163 (1970). *See also Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

D. Whether A Class Settlement Court Has Jurisdiction To Issue An Injunction Over A Class Opt Out Is An Important Unsettled Question Of Federal Law Which Should Be Decided By This Court.

The federal district court's approval of a class action settlement is "little more than a contract between the parties." *Ashley v. City of Jackson*, 464 U.S. 900, 902 (Mem. Dec. 1983) (Justices Rehnquist and Brennan dissenting from a denial of certiorari). An approval of a class settlement does not call for findings of fact regarding the compromised claims. "In determining whether a settlement should be approved, a court does not try the merits of the underlying claims." *Matsushita Elec. Indus. Co. Ltd. v. Epstein*, 116 S. Ct. 873, 882 (1996). Indeed, the dismissal of the underlying *Bologna* class litigation to the case at bar provided that, "the Stipulation and settlement are not an admission by Defendants, nor is the judgment a finding of the validity of any claims in the litigation. . . . " App. *infra* 10.

Given these bedrock class action settlement principles and the language of the final judgment itself, the court of appeals' Memorandum upholding the district court's jurisdiction to enjoin the opt out fails justification. A lawsuit by a Utah class opt out against a Utah law firm in a Utah state court under Utah law does not and cannot threaten the federal court approved class settlement entered between the class plaintiffs and the class defendants.

Further, as demonstrated in Part III B below of this petition, the Ninth Circuit's Memorandum which imposed a kind of continuing protective judgment jurisdiction conflicts with decisions of the court of appeals for the Third and Fifth Circuits. Thus, whether the California federal district court had the judicial power and jurisdiction to enjoin Mr. Bennett, a Utah resident opt out, is an important unresolved question of federal law which should be decided by the Supreme Court.

E. Whether The Policy Of The Anti-Injunction Act Applies To Pending But Not Filed State Court Proceedings Is An Important Unsettled Question Of Federal Law Which Should Be Decided By This Court.

To prevent the "inevitable friction between the state and federal courts" Congress enacted the Anti-Injunction Act to bar federal courts from interferring with state court proceedings. *E.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988). The policies underlining the Anti-Injunction Act are: (1) noninterference with the state's effectuation of its substantive policies; (2) preventing disruption of state judicial proceedings; (3) avoiding duplicative legal proceedings; and (4) preventing negative inferences concerning the state court's ability to enforce constitutional principles. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 599-605, n.15 (1975).

In clear and certain terms, this Court has recognized the absolute character of the Anti-Injunction Act as it applies to existing state court proceedings:

> On its face, the present Act is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of the three specifically defined exceptions. . . . 'This is not a statute conveying a broad general policy for appropriate ad hoc application'. . . . Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court.

Atlantic Coastline R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 286-87 (1970) (citations omitted). *Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation. Amalgamated Clothing Workers of Am. v. Richman Bros. Co.*, 348 U.S. 511, 514 (1955) (emphasis added).

Unfortunately, a footnote in *Dombrowski v. Pfister*, 380 U.S. 479 (1965) has given rise to a type of judicial improvisation this Court denigrated. In *Dombrowski*, the Supreme Court reinstated a civil rights complaint for injunctive relief by holding that the vague provisions of a Louisiana Subversive Activities and Communist Control Act violated the First Amendment. In doing so, the Court appended this comment: "The District Court did not suggest that this statute [the Anti-Injunction Act] denied power to issue the injunction sought. This statute and its predecessors do not preclude injunctions against the institution of state court proceedings, but only bar stays of suits already instituted." 380 U.S. at 484, n.2.

From that footnote reference, some courts of appeal have determined that the Act does not preclude a federal court from enjoining state court actions which were not actually undertaken at the time federal injunctive relief was sought. *E.g., Barancik v. Investors Funding Corp.*, 489 F.2d 933, 935-38, n.5 (7th Cir. 1973); *Union Oil Co. v. Minier*, 437 F.2d 408, 411 (9th Cir. 1970). Justice Stevens, then a circuit court of appeals judge, lamented that "such a construction [of the *Dombrowski* footnote] encourages the liberal granting of protective orders the statute was intended to prevent." *Barancik*, 489 F.2d at 938.

The courts of appeal have recognized that such a construction of the *Dombrowski* dictum encourages an unseemly race to the courthouse. *E.g., Roth v. Bank of Commonwealth*, 583 F.2d 527, 532 (6th Cir. 1978). For that reason, some courts of appeal have held that the policy of the Anti-Injunction Act applies in situations where the federal complaint is filed first, the state court complaint is filed second and the federal motion for injunctive relief is filed third. These courts reason that "[s]urely the Supreme Court did not intend that federal protection of federal rights would depend upon such a race to the courthouse." *E.g., Honey v. Goodman*, 432 F.2d 333, 343 (6th Cir. 1970).

The case now at bar presents a curious but important deviation of the race to the courthouse problem. Parker Nielson, a lawyer who was contemplating but had not agreed to represent Mr. Bennett, met preliminarily with the Utah Lawyers. Without Mr. Bennett's knowledge or approval, Mr. Nielson provided them a draft of a complaint that he had prepared based on grievance statements submitted to the Utah State Bar by Bennett and others. Bennett had not seen the Nielson draft Complaint which was marked DRAFT: 5/5/94 "(CONFIDENTIAL: not for publication or dissemination in any form – for discussion purposes only.)" Upon reading the Nielson draft Complaint, the Utah Lawyers sent the document to California co-counsel who immediately obtained a Temporary Bar Order based on an *ex parte* motion. Thereafter, Bennett explained to the Court that his lawsuit against his former lawyers could not be brought on that draft complaint, nor would class claims be plead or class remedies sought. Nevertheless, relying on the *Dombrowski* footnote, the federal district court and the court of appeals refused to invoke the policy of the Anti-Injunction Act to set aside the injunction to protect Bennett's prospective but unfiled state lawsuit from an injunction.

Five Circuit Courts have yet to rule on this important but unsettled federal issue of preemptive strikes. The issue of when or whether the Anti-Injunction Act should apply to an expectedly pending but not yet filed case involving a restraint of pure speech in a private complaint is an important federal question that should be decided by this Court.

II. The Ninth Circuit's Memorandum Decision Decides Important Underlying Questions Of Federal Law In Ways That Conflict With Relevant Decisions Of This Court. (Rule 10(c))

A. The Memorandum Decision Implicitly Decides The Due Process Issue In A Way That Conflicts With Relevant Decisions Of This Court.

The Memorandum disposition conflicts with this Court's *Phillips Petroleum* decision in two ways. First, the Ninth Circuit did not acknowledge Bennett's Due Process right to be free from the class litigation. Second, the Ninth Circuit did not require any additional contacts between Bennett and the federal district court other than those that existed while the opt out served as a named class representative two years earlier.

B. The Memorandum Decision Ignores The First Amendment And Fifth Amendment Issues In A Way That Conflicts With Relevant Decisions Of This Court.

As set forth in Part I(B) of this Petition, the right to petition a court is among the most precious of the liberties safeguarded by the Bill of Rights. In this case, Mr. Bennett's right of access to a state court is intimately connected both in origin and in purpose with his other First Amendment rights of expression. Criticism of how a case was handled is protected speech. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034-39 (1991). In *Gentile*, the Supreme Court powerfully reaffirmed the primal nature of speech in its position at the core of the First Amendment: "Even if one were to accept respondent's argument that lawyers participating in judicial proceedings may be subjected, consistent with the First Amendment, to speech restrictions that could not be imposed on the press or the general public, the judgment should not be upheld." *Id.* at 1037. The *Gentile* Court delivered a mandate particularly relevant to the case at bar. We have held

that "in cases raising First Amendment issues . . . an appellate court has an obligation to make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* at 1038 (citations omitted). The Ninth Circuit recently reiterated and broadened that standard: "We review legal issues concerning jurisdiction *de novo*." *In re Pacific Enterprises Securities Litig.*, 47 F.3d 373, 376 (9th Cir. 1994). However, The Ninth Circuit's Memorandum decision now before this Court does not reflect that level of examination or review in determining the First Amendment, Fifth Amendment, Due Process and related fundamental jurisdictional questions.

C. The Memorandum Decision Decides The Class Court Jurisdictional Issue In A Way That Conflicts With Relevant Decisions Of This Court.

The court of appeals panel mistakenly relied on *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934) for the notion that the lower court could exercise a variant of protective judgment jurisdiction to enter a Bar Order injunction restricting Mr. Bennett's right to sue the Utah Lawyers. App. *infra* 3.[18] However, unlike a creditor listed on a discharged debtor's bankruptcy schedule, a class plaintiff has a right to timely opt out of a federal court proceeding and once he does so, "he is removed from the litigation entirely." *Phillips Petroleum Co.*, 472 U.S. at 810-11 (1985).

The lower court's decision also conflicts with more recent decisions of this Court. For example, in *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S. Ct. 873, 885, n.1

---

[18] *Cf. Durkin v. Shea & Gould*, 92 F.3d 1510 (9th Cir. 1996), not an opt out case, which held that "the prior adjudication of the adequacy of a settlement does not collaterally estop a settlement party's legal malpractice claim challenging the conduct of a party's lawyer."

(1996) (Ginsberg, J., concurring), this Court let stand the Ninth Circuit's "undisputed" treatment of the opt out in *Epstein v. MCA, Inc.*, 50 F.3d 644, 659 n. 22 (9th Cir. 1995), *rev'd*, 116 S. Ct. 873 (1996) to proceed with his claims "regardless of the preclusive effect of the settlement on the *Epstein* class action."

Moreover, in *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994), this Court held that a district court does not have inherent power to enforce the terms of a settlement agreement. The *Kokkonen* Court emphasized: "[e]nforcement of the settlement agreement . . . is more than just a continuation or renewal of a dismissed suit and hence requires its own basis for jurisdiction." *Id.* at 1675-76. Addressing the issue of ancillary jurisdiction, the *Kokkonen* court explained that, "[N]o controversy" to obtain or secure the fruits, benefits and advantages of the proceeding in a former suit "can be regarded as dependent or ancillary unless it has a direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit." *Id.* at 1676 (citing *Fulton County Nat'l Bank of Atlanta v. Hozier*, 267 U.S. 276, 280 (1925)).

Mr. Bennett's malpractice lawsuit against the Utah Lawyers has nothing to do with any assets drawn into the district court's control or possession. The class defendants paid the same settlement. The class plaintiffs received the same settlement. Bennett remains a non-party with no right to any share of that settlement. Thus, the court of appeals' ruling that the district court had inherent jurisdiction to preserve and protect the "fruits and advantages" of its judgment by issuing a Bar Order injunction over a class opt out is clearly contrary to the holding and reasoning of the *Kokkonen* Court.

The Court of Appeals Memorandum decision also conflicts with this Court's recent ruling and reasoning in *Peacock v. Thomas*, 116 S.Ct. 862, 867 (1996). The *Peacock* court held that a district court did not possess ancillary jurisdiction over what was a new action. The *Peacock*

Court explained that, "claims alleged to be factually interdependent with and, hence, ancillary to claims brought in an earlier federal lawsuit will not support federal jurisdiction over a subsequent lawsuit." *Id.* The *Peacock* Court further elaborated, "In determining the reach of the federal courts' ancillary jurisdiction, we have cautioned against the exercise of jurisdiction . . . where 'the relief [sought is] of a different kind or on a different principle' than that of the prior decree." *Id.* at 869 (quoting *Dugas v. American Surety Co.*, 300 U.S. 414, 428 (1937)).

In summary, to allow the Ninth Circuit to adopt a concept of continuing jurisdiction over opt outs in essence gives district courts jurisdiction in perpetuity over opt outs. This concept is contrary to the plain implication of Rule 23 and to the foregoing decisions of this Court. Federal courts do not have unlimited continuing jurisdiction over non-parties to litigation.

III. The Ninth Circuit's Memorandum Decision Conflicts With The Decisions Of The United States Courts Of Appeal For The Third, Fifth And Sixth Circuits On The Same Important Matters. (Rule 10(a))

A. The Memorandum Decision Conflicts With A Recent First Amendment Decision Of The United States Court Of Appeals For The Sixth Circuit.

The Ninth Circuit's Memorandum decision conflicts with the recent opinion of the Sixth Circuit in *Proctor & Gamble Co. v. Bankers Trust, Co.*, 78 F.3d 219, 222-25 (6th Cir. 1996) which held that an injunction preventing the publication of litigation documents ("pure speech") is a prior restraint of free speech in violation of the First Amendment. The Sixth Circuit Court of Appeals rebuked Chief District Judge Feikens for failing "to conduct any First Amendment inquiry before granting the two TRO's." *Id.* at 225. "[T]he documents in question are

standard litigation filings. The private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint. . . . The permanent injunction, therefore, was patently invalid and should never have been entered." *Id.*

Unlike the lower court in the case at bar, the Sixth Circuit recognized that there is a "fundamental difference between a standard TRO issued under Rule 65 in a non-speech context and a special injunctive order granting a prior restraint." *Id.* at 226. "[T]here is no place for such [*ex parte*] orders in the First Amendment realm 'where no showing is made that it is impossible to serve or to notify the opposing parties and give them an opportunity to participate.' " *Id.* (quoting *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 180 (1968)). The Sixth Circuit cogently observed that "Indeed, the Supreme Court has never upheld a prior restraint, even faced with the competing interest of national security or the Sixth Amendment right to a fair trial." *Id.* at 227.

B. The Memorandum Decision That A Federal Class Court Has Jurisdiction To Issue A Bar Order Injunction Over A Class Opt Out, Conflicts With Decisions Of The United States Courts Of Appeal For The Third And Fifth Circuits.

The Ninth Circuit's Memorandum decision holding that a federal court had jurisdiction to enter a Bar Order injunction over a class opt out conflicts with the Third Circuit's decision of *In re Glenn W. Turner Enterprises Litig.*, 521 F.2d 775 (3rd Cir. 1975). The United States Court of Appeals for the Third Circuit denied an injunction of state court proceedings because it would not be "necessary in aid of" the federal class court's jurisdiction. *Id.* at 779-80. The *Turner* court properly reasoned that an injunction against a class opt out's actions cannot be "necessary" to protect the class litigation. *Id.* at 780-81.

The Memorandum disposition of the case at bar also directly conflicts with the United States Court of Appeals for the Fifth Circuit's decision *In re Corrugated Container Antitrust Litig.*, 756 F.2d 411, 418 (5th Cir. 1985) which held:

> A class action judgment cannot be used to collaterally estop an opt-out plaintiffs' action against a defendant in a separate action. An opt out plaintiff is not a party to the class action and is not bound by the class action judgment. The doctrine of collateral estoppel cannot bind a person who was neither a party nor privy to a prior suit.

IV. The Ninth Circuit's Unpublished Memorandum Disposition Is A Departure From The Usual Course Of Judicial Proceedings And An Acquiescence In A Magistrate's Departure So Far From The Usual Course Of Judicial Proceedings As To Call For The Exercise Of The Supreme Court's Supervisory Power. (Rule 10(a))

From the beginning, the courts below departed from the usual course of judicial proceedings. First, the Utah Lawyers were not required to file a complaint for injunctive relief. Instead, a federal magistrate allowed the lawyers to submit *in camera*, an *ex parte* motion in a closed class action case. No former named class representative authorized the motion. All the named class representatives opposed the motion by submitting similar objection letters. App. *infra* 42-43. 28 U.S.C. § 636(b)(1)(A) explicitly provides that a magistrate has no authority whatsoever to issue a pre-trial injunction. Yet despite all that, without notice or attempt at notice,[19] and without requiring a

---

[19] "The stringent [notice and bond] restrictions imposed by . . . Rule 65, on the availability of *ex parte* temporary restraining orders reflect the fact that our entire jurisprudence

bond or other security, the magistrate issued a "Temporary Bar Order" injunction against Mr. Bennett. The magistrate sat, and sits, in the Southern District of California. Bennett resides in Salt Lake City, Utah and was served with process in that city at 9:00 p.m. on July 5, 1994.

The Temporary Bar Order set a hearing for July 11, 1994 at 10:30 a.m. in San Diego "to show cause why this Order shall not be made permanent." This temporary restraining order/preliminary injunction[20] provided that "If David D. Bennett wishes a hearing on the Order to Show Cause, with the Temporary Bar Order remaining in effect, the Court is willing to grant such a continuance." App. *infra* 15. However, Opt Out Bennett, a Utah resident, was directed by the California federal court to file and personally serve any opposition papers by 4:00 p.m. on July 7, 1994, something he could not fairly be required to do. App. *infra* 15.

The Temporary Bar Order Injunction was later made Permanent verbatim by a district judge. In doing so, the judge did not follow Federal Rule 65 and require a showing of irreparable injury to the movants absent the injunction. Instead, without an evidentiary proceeding, the district judge concluded there was no harm in granting the injunction and that the opt out could not challenge how his former lawyers conducted the class litigation. Further, the district judge did not void the magistrate's misconduct. Instead, the court only indirectly acknowledged the magistrate's errors:

---

runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 438-39 (1974).

[20] *C.f.* Fed. R. Civ. P. 65 "Bar Order" is not a statutory term.

> The Court: Good morning. This is a motion by plaintiff class counsel for a temporary or permanent bar order. I should say that procedurally I realize that the Court got here by a somewhat indirect mechanism and I'd like to state that – what happened for the record and see if counsel have anything they want to add to the papers.

App. *infra* 26. The "indirect mechanism" referred to by the district judge was the magistrate's disregard of the statutory limits of authority. 28 U.S.C. § 636(b)(1)(A), and Federal Rule of Civil Procedure 65. At a later proceeding the district judge opined, "The legal profession is under attack and personally I think most of the attacks are unwarranted." App. *infra* 49.

The related fundamental matters of lack of statutory authority, the failure to follow Federal Rule 65, and lack of *in personam* jurisdiction all warranted *de novo* review of the magistrate's actions by the appellate court.[21] *E.g., In re Pacific Enterprises Securities Litig.*, 47 F.3d 373, 376 (9th Cir. 1995). The Ninth Circuit Court of Appeals should have followed its own statements of case law governing this situation: "Federal magistrates are creatures of statute, and so is their jurisdiction. . . . We cannot ask them to do something Congress has not authorized them to do." *NLRB v. A-Plus Roofing, Inc.*, 39 F.3d 1410, 1415 (9th Cir. 1994). "A judgment is void . . . if the court that rendered judgment lacked jurisdiction of the subject matter, or of the parties, or if the court acted in a manner inconsistent with Due Process of law." *In re Center Wholesale, Inc.*, 759 F.2d 1440, 1448 (9th Cir. 1985). Instead, the Ninth Circuit ignored and acquiesced in the district court's denial of Due Process and its departure from the usual and

---

[21] These issues were presented to the court of appeals below. *See* App. *infra* 50-54.

required course of judicial proceedings. Nowhere in the Memorandum does the court of appeals acknowledge or even mention the district court's misconduct.[22]

This unusual acquiescence is due to the Ninth Circuit departing from the usual judicial course of authorizing an opinion for publication.[23] Critics of unpublished opinions point out that "lack of publication usually reflects that court's belief that the dispute is one-sided. . . . " *Bankers Trust Co. v. Old Republic Insurance Co.*, 7 F.3d 93, 94-95 (7th Cir. 1993) and that unpublished opinions often fail to present sufficient legal analysis. *E.g., Tonnesen v. Yonkers Contracting Co.*, 847 F. Supp. 12, 17 (E.D. N.Y. 1994).[24] Worst of all, unpublished opinions run counter to the basic policy of stating reasons within a reviewable opinion.

> [T]he decision must be able to withstand the scrutiny of analysis, against the record evidence, as to its soundness under the Constitution and the statutory and decisional law [the courts] must follow, and as to its consistency with our precedents. Our orders and judgments [unpublished opinions] like our published opinions . . . should never be shielded from search and examination.

In re Rules of the U.S. Ct. of App. for the Tenth Circuit adopted November 18, 1986, 955 F.2d 36, 38 (10th Cir. 1992)

---

[22] App. *infra* 1-4; compare footnote 4, *supra*, with *United States v. Microsoft*, 56 F.3d 1448, 1463-64 (D.C. Cir. 1995) & 28 U.S.C. § 455(a), (b)(1).

[23] Ninth Circuit Rules 36-1 through 36-3 (App. *infra* 40) allow for unpublished opinions which generally may not be cited to by the Court.

[24] For detailed discussion of how limited publication negatively affects the quality of judicial decision making *see, e.g.*, William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 598-626 (1981).

(Holloway, C. J., Barrett and Baldock, J.J. dissenting). "The unpublished method of decision making is contrary to the ideological foundation of our common law system." Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 WASHBURN L.J. 155, 186 (1992). The common law's strength depends on the law's ability to adapt existing precedent to previously unforeseen and changing facts and social conditions.

The Ninth Circuit's Memorandum decision is subject to all of the foregoing criticisms. The Memorandum's failure to discuss the district court's misconduct and essentially rewriting of the Bar Order injunction coupled with an affirmance instead of an order modifying or vacating the Bar Order, all suggest the dispute was one-sided. Further, the Court's misapplication of a bankruptcy court jurisdictional concept to a securities class case and the failure to follow basic constitutional, jurisdictional, and class action principles enunciated by this Court as well as decisions in the Third, Fifth and Sixth Circuits and its own Circuit, show that the Memorandum lacks adequate legal analysis. In *Browder v. Director Ill. Dept. of Corrections*, 434 U.S. 257, 258-59, n. 1 (1978), this Court noted, "Finally, petitioner questioned the validity of the Seventh Circuit's unpublished opinion rule. We leave those questions for another day." That day is now. The only way this unpublished decision and others like it can be held accountable by public review, analysis and scrutiny, is for this Court to exercise its supervisory power to grant certiorari and set a standard for unpublished decisions.

CONCLUSION

This is the rare case that qualifies for certiorari under more than one prong of Rule 10. The United States Court of Appeals for the Ninth Circuit's decision upholding a prior restraint injunction over a class opt out conflicts

with bedrock constitutional, jurisdictional and class action principles enunciated by the United States Supreme Court and with decisions of the United States Court of Appeals for the Third, Fifth and Sixth Circuits. The Ninth Circuit's acquiescence of the lower court's departure from 28 U.S.C. § 636, Fed. R. Civ. P. 65, and fundamental protections of Due Process together with its affirmation of an unprecedented prior restraint imposed on an opt out's right to petition a court for redress, calls for certiorari. This case presents important unsettled class action jurisdictional and constitutional questions that should be settled by this Court.

For each of these important, compelling reasons, the Petition for Certiorari should be granted to resolve the questions presented for review.

Respectfully submitted this 25th day of October, 1996.

DALE F. GARDINER,
Counsel of Record
PATRICIA A. O'RORKE
O'RORKE & GARDINER, LLC
6995 Union Park Center – Suite 470
Midvale, Utah 84047
Telephone: (801) 569-3131

R. PRIYA SESHACHARI
Taft Securities Litigation
1200 Clay Street – Suite 15
San Francisco, California 94108
Telephone: (415) 922-1832

Counsel for Petitioner David D. Bennett

APPENDIX INDEX

A. Memorandum Disposition Of The United States Court of Appeals for the Ninth Circuit.... App. 1

B. Other Opinions, Orders, etc. Necessary to Ascertain the Grounds of the Judgment

1. Abstract Of Final Judgment Of Dissmissal with Prejudice Judgment Allowing Bennett To Opt Out Of The Class Action..... App. 5

2. The Temporary Bar Order Prior Restraint Injunction And Order To Show Cause.. App. 13

3. Order Granting Motion For Permanent Bar Order (Prior Restraint Injunction)..... App. 16

4. Order of November 16, 1994..... App. 19

5. Abstract Of 9/6/94 Transcript Of Proceeding Showing The District Court's Reasoning For Making The Prior Restraint Injunction Permanent..... App. 24

C. The Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing... App. 34

D. Pertinent Constitutional and Statutory Provisions

1. U.S. Const. Art. III, Section 1..... App. 36

2. U.S. Const. Amend I..... App. 36

3. U.S. Const. Amend V..... App. 36

4. 28 U.S.C. § 636(b)(1)(A)..... App. 36

5. 28 U.S.C. § 1254..... App. 37

6. 28 U.S.C. § 1367..... App. 38

7. 28 U.S.C. § 1651..... App. 39

APPENDIX INDEX – Continued

8. 28 U.S.C. § 2283..... App. 39

9. Ninth Circuit Court of Appeals Rules 36-1 through 36-3..... App. 40

E. Other Material the Petitioner Believes Essential to Understanding the Petition

1. Sample Letter Signed By The Named Class Representatives..... App. 42

2. Abstract of May 1, 1995 Transcript of Proceeding..... App. 44

3. Abstract of Jan. 11, 1996 Transcript of Proceeding..... App. 48

4. Table of Contents to Petitioner's Opening Brief Before the United States Court of Appeals for the Ninth Circuit..... App. 54

APPENDIX A

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID D. BENNETT, et al., Plaintiffs-Appellants, v. GEN-PROBE, INC.; THOMAS H. BOLOGNA, et al, Defendants, and LAW FIRM OF JONES, WALDO, HOLBROOK & MCDONOUGH, Appellee.	No. 95-55306 D.C.No. CV-90-01183-JNK MEMORANDUM* (Filed Jan. 14, 1996)

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, District Judge Presiding
Argued and Submitted April 10, 1996
Pasadena, California

Before: SCHROEDER, LEAVY, Circuit Judges and TRIMBLE** District Court Judge

---

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**Honorable James T. Trimble, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

Plaintiff-appellant, David D. Bennett is a former named plaintiff in *Bennett v. Bologna*, a securities fraud class action that was settled after Bennett opted out. Bennett appeals the district court's issuance of a permanent bar order obtained by counsel for the plaintiff class.

The class counsel who obtained the bar order argue initially on appeal that this court lacks jurisdiction to review the bar order because Bennett did not file a timely notice of appeal. *Browder v. Director*, 434 U.S. 257, 264 (1978) (timely notice of appeal both mandatory and jurisdictional). Bennett's notice of appeal was, however, timely filed with respect to the district court's denial of Bennett's motion, argued pursuant to Federal Rules of Civil Procedure 59(e) and 60, "to set aside order, and alternatively, . . . to alter or amend order." Because the district court's denial of Bennett's motion addresses the merits of Bennett's arguments, this court reaches the merits of Bennett's appeal.

On the merits of his appeal, Bennett contends that since no federal court has jurisdiction to hear the underlying state malpractice and breach of contract claims he is seeking to litigate in Utah, the district court lacked subject matter jurisdiction to enter the bar order. The district court has jurisdiction, however, to enter orders to preserve and protect the "fruits and advantages" of its judgment. *See Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934); *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1524 (9th Cir. 1983) ("[a] district court retains jurisdiction to enforce the judgments it enters" and may reinforce res judicata or collateral estoppel via injunction). Thus, the district court had jurisdiction to enter a bar

order to protect the finality of its class action judgment. The issue is whether this bar order serves such a purpose. The district court may not prevent a Utah court from litigating malpractice and breach of contract issues relating to appellee law firm's representation of Bennett, because such litigation does not endanger or affect the "fruits and advantages" of the district court's judgment settling the underlying class action. Further, in adjudicating Bennett's malpractice and breach of contract claims, a Utah court may examine the adequacy of the class settlement, but only insofar as that settlement sheds light on appellee law firm's representation of Bennett. The district court was entitled to protect the district court's own judgment, and thereby ensure its finality so that the class members would still receive the same settlement; the class defendant would remain obligated to pay the same settlement, and Bennett would remain a non party with no right to any share of that settlement. *Cf. Samuel C. Ennis & Co., Inc. v. Woodmar Realty Co.*, 542 F.2d 45, 48 (9th Cir. 1976) (injunction proper where state action, if successful, would nullify the federal bankruptcy court's order of distribution).

The bar order contains a disclaimer that it does not "restrain David D. Bennett from pursuing solely his individual claims. . . . " This should not be construed to limit Bennett to pursuit of his individual claims against the original class action defendant and to preclude any challenge to counsel's handling of the class action. The district court's order must be construed narrowly to prevent any collateral attack upon the class action judgment and its finality as between the parties to that judgment. We hold, however, that the bar order cannot be construed to

prevent Bennett from litigating issues in his malpractice and breach of contract actions that relate to class counsels' handling of the class action, so long as such litigation does not undermine the finality of class action judgment. The order, as so construed, is therefore AFFIRMED.

Any further appellate proceedings in this matter, including any appeals from a contempt order, shall be referred to this panel.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DAVID D. BENNETT; JAMES W. BENNETT; LORRAINE J. ENGSTROM; BUD MAHAS CONSTRUCTION CO., a Utah corporation; HAROLD SANDBECK; ARDEN LUBECK; FRANKLIN REED BENNETT; SARA LIU; and ALICE LIU, individually, and on behalf of Gen-Probe, Incorporated, stockholders similarly situated,

Plaintiffs,

vs.

THOMAS A. BOLOGNA; THOMAS H. ADAMS; HOWARD C. BIRNDORF; MALIN BURNHAM; BROOK H. BYERS; DAVID F. HALE; CHARLES M. HARTMAN; LEWIS H. SARETT; DAVID E. KOHNE; GEN-PROBE INCORPORATED, a Delaware corporation; CHUGAI ACQUISITION USA, INC., a Delaware corporation; CHUGAI HOLDING USA INC., a Delaware corporation; and CHUGAI PHARMACEUTICAL CO., LTD., a Japanese corporation,

Defendants.

Civil No. 90-1183-G(P)

CLASS ACTION

FINAL JUDGMENT OF DISMISSAL WITH PREJUDICE

(Filed Sept. 10, 1992)

The Plaintiffs and the Defendants (as those terms are defined in the Stipulation of Settlement filed with the Court on June 2, 1992 ("Stipulation")) having executed and filed the Stipulation; the Court having entered its Order thereon dated June 2, 1992, directing that notice of the proposed settlement of the action be mailed to the Class and published and scheduling a hearing to be held to determine whether the proposed settlement should be approved as fair, reasonable and adequate; a hearing having been held on August 26, 1992, at which all interested persons were given an opportunity to be heard; and the Court having read and considered all submissions in connection with the proposed settlement, and having reviewed and considered the files and records herein, the Court finds and concludes that:

I. COMMENCEMENT OF THE CLASS ACTION AND PLAINTIFFS' ALLEGATIONS

On December 5, 1989, one of the Plaintiffs filed a class action complaint in the United States District Court for the District of Utah, which was, after the addition of the remaining Plaintiffs, later transferred to this Court (the "Litigation"). The Fourth Amended Complaint alleges that the Defendants' conduct violated provisions of the Securities Exchange Act of 1934 and also constituted fraud and deceit, negligent misrepresentation, breach of fiduciary duties and negligence. In entering into the Stipulation, Plaintiffs have not conceded a lack of merit of any claim in the Fourth Amended Complaint.

II. PRETRIAL PROCEEDINGS IN THE LITIGATION

On June 2, 1992, this Court conditionally certified the Litigation to proceed as a Class Action on behalf of the named Plaintiffs and all other persons who beneficially owned shares of GEN-PROBE common stock that were either: (i) acquired by CHUGAI ACQUISITION USA, INC. for $6.25 cash per share pursuant to the Tender Offer by CHUGAI ACQUISITION USA, INC. that commenced on or about November 6, 1989 (the "Tender Offer"); or (ii) converted into the right to receive $6.25 cash per share pursuant to the merger of CHUGAI ACQUISITION USA, INC. into GEN-PROBE on or about December 15, 1989 (the "Merger"). Excluded from this class are: (i) the Defendants, (ii) members of the immediate families of the individual named defendants, (iii) Defendants' "affiliates" and "controlling persons" (as those terms are defined in Securities and Exchange Commission ("SEC") Rules 144 and 405), all of whom held "restricted securities" of GEN-PROBE subject to Rule 144 and Regulation D of the SEC, and some of whom had private contractual agreements with GEN-PROBE which restricted public resale of their stock, and (iv) employees of GEN-PROBE, CHUGAI ACQUISITION USA, INC., CHUGAI HOLDING USA, INC. or CHUGAI PHARMACEUTICAL CO., LTD. with respect to shares of GEN-PROBE common stock purchased by such employees after October 27, 1989. This definition defines the class (the "Class") for purposes of the Litigation, the Settlement, and this Final Judgment of Dismissal with Prejudice (the "Judgment").

In certifying the Litigation as a Class Action, the Court found and finds that (1) the members of the Class are so numerous that joinder of all Class Members in this action is impracticable; (2) there are questions of law and fact common to the members of the Class; (3) the claims or defenses of the representative Plaintiffs are typical of the Claims or defenses of the Class; (4) the representative Plaintiffs and their counsel have fairly and adequately protected the interests of the Class; (5) the questions of law and fact common to the members of the Class predominate over any questions affecting only individual members of the Class; and (6) a Class Action is superior to other available methods for the fair and efficient adjudication of the controversy, considering, *inter alia*, (a) the interest of members of the Class in individually controlling the prosecution or defense of separate actions, (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the Class, (c) the desirability or undesirability of prosecuting the litigation of these claims in this particular forum, and (d) the difficulties likely to be encountered in the management of the Class Action.

The Plaintiffs and Defendants have entered into a Stipulation which provides for the settlement of the Litigation on behalf of the Plaintiffs and all Settlement Class Members with the Defendants subject to approval by this Court of its terms and to the entry of this Judgment. The Court scheduled a hearing to consider the approval of the Stipulation, and directed that notice of the proposed settlement and hearing be mailed to Class Members and published.

In accordance with the Stipulation, and an Order of the Court entered on June 2, 1992, Plaintiffs' Counsel caused to be mailed to the Class, and caused to be published, a notice (the "Notice") informing class members of the pendency and proposed settlement of the Litigation, the opportunity to request exclusion from the Class and the opportunity to object to the Settlement. Declarations of mailing and publication of the Notice were filed

* * *

savings in time and money to the Court and the litigants and will further the interests of justice.

The Stipulation is the product of good faith arm's length negotiations by the parties thereto.

NOW THEREFORE, GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. The members of the Class listed on Exhibit 1 hereto have submitted valid requests for exclusion and are not bound by this Judgment.

2. The named Plaintiffs and all other persons who beneficially owned shares of GEN-PROBE common stock that were either: (i) acquired by CHUGAI ACQUISITION USA, INC. for $6.25 cash per share pursuant to the Tender Offer; or (ii) converted into the right to receive $6.25 cash per share pursuant to the Merger (other than (i) the Defendants, (ii) members of the immediate families of the individual named Defendants, (iii) Defendants' "affiliaites" and "controlling persons" (as those terms are defined in Securities and Exchange Commission ("SEC")

Rules 144 and 405), all of whom held "restricted securities" of GEN-PROBE subject to Rule 144 and Regulation D of the SEC, and some of whom had private contractual agreements with GEN-PROBE which restricted public resale of their stock, (iv) employees of GEN-PROBE, CHUGAI ACQUISITION USA, INC., CHUGAI HOLDING USA, INC. or CHUGAI PHARMACEUTICAL CO., LTD. with respect to shares of GEN-PROBE common stock purchased by such employees after October 27, 1989, and (v) persons otherwise excluded by the Court) are bound by this Judgment and by the settlement including the releases provided for in this Judgment.

3. The Stipulation and settlement are not an admission by Defendants, nor is this Judgment a finding of the validity of any claims in the Litigation or of any wrongdoing by them. Furthermore, neither the Stipulation nor the settlement is a concession by any Defendant and neither shall be used as an admission of any fault or omission by any person. Neither this Judgment, the Stipulation nor any document referred to herein nor any action taken to carry out the Stipulation, is, may be construed as, or may be used as an admission by or against the Defendants of any fault, wrongdoing or liability whatsoever. Entering into or carrying out the Stipulation, and the Exhibits thereto, and any negotiations or proceedings related thereto shall not in any event be construed as, or deemed to be evidence of, an admission or concession with regard to the denials of or defenses by Defendants, and shall not be offered or received in evidence in any action or proceeding against any party hereto in any court, administrative agency or other tribunal, for any purpose whatsoever other than to enforce the

provisions of this Judgment, the Stipulation, or any related agreement or release; except that this Judgment, Stipulation and the Exhibits may be filed in this Litigation or related Litigation as evidence of the Settlement or in any subsequent action against or by the Defendants, or any persons who were given releases as part of the Settlement to support a defense of *res judicata,* collateral estoppel, release, or other theory of issue preclusion, claim preclusion or similar defense.

* * *

Settlement Fund, including interest earned thereon;

(c) Hearing and determining Plaintiffs' Counsel's applications for attorneys' fees, costs and expenses;

(d) Hearing and determining requests for additional compensation to any of the named Plaintiffs pursuant to paragraph VII.I.2 of the Stipulation;

(e) Hearing and determining any party's assertion that any person is or is not included in the definition of the Class;

(f) Hearing and determining any application by any party to the Stipulation for a bar order;

(g) Enforcing and administering the Stipulation; and

(h) Other matters related or ancillary to the foregoing.

10. It is adjudged that the Notice mailed to Class Members and published in accordance with the Order of this Court dated June 2, 1992, was the best notice practicable under the circumstances and included individual

notice to all Class Members who could be identified through reasonable effort. Accordingly, it is further adjudged that the parties have fully complied with due process and the Federal Rules of Civil Procedure and due and adequate notice of the settlement has been provided to members of the Class.

DATED: 8/27, 1992

/s/ LOUISA S. PORTER
HONORABLE LOUISA S. PORTER
UNITED STATES MAGISTRATE

IT IS SO ORDERED.
DATED 9/10/92
/s/ EARL B. GILLIAM
UNITED STATES DISTRICT JUDGE

EXHIBIT 1

Class Members Who Submitted Valid Requests for Exclusion:

1. DAVID D. BENNETT submitted a valid request for exclusion on August 13, 1992.

Michael L. Kirby (050895)
James R. Lance (147173)
POST KIRBY NOONAN & SWEAT
600 West Broadway, Suite 1100
San Diego, CA 92101-3355
Telephone No. (619) 231-8666

Christopher L. Burton (USB #0511)
Sidney G. Baucom (USB #0247)
James W. Peters (USB #5131)
JONES, WALDO, HOLBROOK & McDONOUGH
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, UT 84101
Telephone No. (801) 521-3200

Attorneys for Plaintiffs (except David D. Bennett)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DAVID D. BENNETT, JAMES W. BENNETT, LORRAINE J. ENGSTROM, MO-VEST, LTD., HAROLD SANDBECK, ARDEN LUBECK, and FRANKLIN REED BENNETT, SARA LIU, and ALICE LIU, individually, and on behalf of Gen-Probe, Incorporated, stockholders similarly situated, Plaintiffs, v. THOMAS H. BOLOGNA, THOMAS H. ADAMS, HOWARD C. BIRNDORF, MALIN BURNHAM, BROOK H. BYERS,	Case No. 90-1183-G(POR) TEMPORARY BAR ORDER; ORDER TO SHOW CAUSE AND SETTING HEARING (Filed Jul. 5, 1994)

DAVID F. HALE, CHARLES M. HARTMAN, LEWIS H. SARETT, and DAVID E. KOHNE, GEN-PROBE INCORPORATED, a Delaware corporation; CHUGAI ACQUISITION USA, INC., a Delaware corporation; CHUGAI HOLDING USA INC., a Delaware corporation; and CHUGAI PHARMACEUTICAL CO., LTD., a Japanese corporation,

Defendants.

Having duly considered the ex parte papers submitted in support of the Temporary Bar Order and for good cause appearing therefor,

IT IS HEREBY ORDERED.

1. That David D. Bennett and his agents or attorneys shall be, pending a hearing on this matter, enjoined and restrained from initiating or maintaining any lawsuit against Jones, Waldo, Holbrook & McDonough and its attorneys (including Christopher L. Burton and Sidney G. Baucom) or any other class counsel which in any way involves:

a. The sufficiency or fairness of the class action settlement in the above-entitled action;

b. The competency of class counsel and counsel's legal services on behalf of the class in the above-entitled action;

c. The award of fees and costs to class counsel from the class action settlement fund;

d. The award of additional compensation to any of named Plaintiffs.

2. This Order does not bar or restrain David D. Bennett from pursuing solely his own individual claims as a former Gen-Probe shareholder, except to the extent such claims have been previously adjudicated by this Court.

3. A hearing shall be held at 10:30 A.m. on July 11, 1994 in this Court, at 940 Front Street, San Diego, California to show cause why this Order shall not be made permanent.

4. David D. Bennett may file (and shall personally serve) any opposition papers by 4:00 p.m. on July 7, 1994.

5. If David D. Bennett wishes a continuance of the hearing on the Order to Show Cause, with the Temporary Bar Order remaining in effect, the Court is willing to grant such a continuance.

DATED: 7/5/94

/s/ Louisa S. Porter
Honorable Louisa S. Porter
United States Magistrate Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DAVID D. BENNETT, JAMES W. BENNETT, LORRAINE J. ENGSTROM, MO-VEST, LTD., ENGSTROM, MO-VEST, LTD., HAROLD SANBECK, ARDEN LUBECK, and FRANKLIN REED BENNETT, SARA LIU, and ALICE LIU, individually, and on behalf of Gen-Probe Incorporated stockholders similarly situated,

Plaintiffs,

v.

THOMAS H. BOLOGNA, THOMAS H. ADAMS, HOWARD C. BIRNDORF, MALIN BURNHAM, BROOK H. BYERS, DAVID F. HALE, CHARLES M. HARTMAN, LEWIS H. SARETT, and DAVID E. KOHNE, GEN-PROBE INCORPORATED, a Delaware corporation; CHUGAI ACQUISITION USA INC, a Delaware corporation; CHUGAI HOLDING USA INC., a Delaware corporation; and CHUGAI PHARMACEUTICAL CO. LTD., a Japanese corporation,

Defendants.

Case No. 90-1183K(POR)

ORDER GRANTING MOTION FOR PERMANENT BAR ORDER

(Filed Oct. 4, 1994)

The motion of class counsel — Jones, Waldo, Holbrook & McDonough and Post Kirby Noonan & Sweat — for permanent bar order against David D. Bennett, came on regularly for hearing before the Honorable Judith N. Keep, United States Chief District Judge presiding, on Tuesday, September 6, 1994. Class counsel were represented by Michael L. Kirby of Post Kirby Noonan & Sweat. Christopher L. Burton, Sidney G. Baucom and James W. Peters of Jones, Waldo, Holbrook & McDonough were also present in Court. David D. Bennett was represented by David L. Sanders and R. Priya Seshachari. David D. Bennett was also present in Court. The Court, having considered the memoranda and declarations submitted by both sides and having heard oral argument, for good cause showing, issued an oral ruling which is incorporated herein by reference.

For the reasons stated in the oral ruling, IT IS HEREBY ORDERED that the motion of class counsel for a permanent bar order is granted, to the effect that temporary bar order, issued by the Honorable Louisa S. Porter in this case on July 5, 1994, now becomes permanent.

IT IS SO ORDERED

DATED: Oct. 3, 1994

/s/ Judith N. Keep
JUDITH N. KEEP, Chief Judge
United States District Court

cc: Michael L. Kirby
Post Kirby Noonan & Sweat
600 West Broadway, Suite 1100
San Diego, CA 92101-3355

Christopher L. Burton
Jones, Waldo, Holbrook & McDonough
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, UT 84101

David L. Sanders
Law Offices of David L. Sanders
400 East, 425 South
Salt Lake City, UT 84111

R. Priya Seshachari
Taft Securities Litigation, Inc.
79 "A" Street, Suite 106
Salt Lake City, UT 84103

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DAVID D. BENNETT, JAMES W. BENNETT, LORRAINE J. ENGSTROM, MO-VEST, LTD., HAROLD SANBECK, ARDEN LUBECK, and FRANKLIN REED BENNETT, SARA LIU, and ALICE LIU, individually, and on behalf of Gen-Probe Incorporated stockholders similarly situated,

Plaintiffs,

v.

THOMAS H. BOLOGNA, THOMAS H. ADAMS, HOWARD C. BIRNDORF, MALIN BURNHAM, BROOK H. BYERS, DAVID F. HALE, CHARLES M. HARTMAN, LEWIS H. SARETT, and DAVID E. KOHNE, GEN-PROBE INCORPORATED, a Delaware corporation; CHUGAI ACQUISITION USA INC, a Delaware corporation; CHUGAI HOLDING USA INC., a Delaware corporation; and CHUGAI PHARMACEUTICAL CO. LTD., a Japanese corporation,

Defendants.

Case No. 90-1183K(POR)

ORDER

(Filed Nov. 16, 1994)

In compliance with this court's order of October 19, 1994, respondent David D. Bennett submitted a Three-Paged [sic] Memorandum to Set Aside or Amend Order in Reconsideration. The purpose of the October 19, 1994 order was to obtain a brief summary of issues and authority which respondent intends to raise on his motion to reconsider or set aside my order of October 4, 1994. The court would consider the summary and then determine whether to hear the motion.

BACKGROUND

Respondent was a plaintiff in the above-captioned class action. In a letter dated August 13, 1992, he opted out of the class and the settlement in the class action. On August 26, 1992, Magistrate Judge Porter held a good faith settlement hearing and dismissed the action with prejudice. In a letter to class counsel dated May 5, 1994, respondent indicated that he would sue them for malpractice in the class action.

On July 1, 1994 class counsel moved for a temporary bar order to prevent respondent from purporting to represent the class in any class action litigation attempting to pursue claims on behalf of the class, and from pursuing any individual claims and issues which were already resolved by a final judgment or final order of this court. Magistrate Judge Porter granted a temporary restraining order on July 5, 1994. The case was then re-assigned to me for a hearing on a permanent bar order. I held a hearing on September 6, 1994. I gave respondent an opportunity to clarify in court what kind of legal action he wished to pursue against class counsel, and it was

apparent that remedies were available to him which were not barred by res judicata, and which would not be barred by the permanent bar order. I issued a permanent bar order on October 4, 1994.

DISCUSSION

Respondent presents three possible grounds pursuant to Federal Rule of Civil Procedure 60(b). I note that the granting or denial of a Rule 60(b) motion is within district court's sound discretion. *See Salvarese v. Edrick Transfer & Storage, Inc.*, 513 F.2d 140, 146 (9th Cir. 1975). Respondent presents two arguments that the order is void pursuant to Rule 60(b)(4). First, respondent contends that this court lacked jurisdiction because the movants did not satisfy the relitigation exception to the Anti-Injunction Act, 28 USC § 2283. This court did not base its jurisdiction on the Anti-Injunction Act but rather exercised supplemental jurisdiction pursuant to 28 USC § 1367. With respect to the Anti-Injunction Act, this court determined that no suit had yet been filed in state court, and the Act does not apply to suits which have not yet been filed, *Dombrowski v. Pfister*, 380 U.S. 479 (1965). My ruling was not based on the relitigation exception to the Anti-Injunction Act but rather on the doctrine of collateral estoppel.

Second, respondent seems to contend that he, as a plaintiff who had opted out of the class and was not a party to the settlement, is no longer a party. If the nature of this argument is that the court lacked personal jurisdiction, I have discussed the issue extensively in my oral ruling, and find that respondent raises no new grounds

which would warrant reconsideration. I note that respondent cites new authority which holds that a plaintiff who had opted out of class before settlement, is not bound by res judicata effect of the settlement. *McCubbery v. Boise Cascasde,* 71 F.R.D. 62, 71-72 (N.D. Cal. 1976). I note that the order in the present case does not prohibit respondent from pursuing his individual claims as former Gen-Probe shareholder.

Respondent also presents a Rule 60(b)(1) argument that my order be set aside as a result of mistake. Respondent contends based on Rule 65 that the order is invalid as he had no notice of the temporary bar order hearing and because movants posted no bond. Respondent has already raised this issue in his opposition to the temporary and permanent bar order, and the court has considered it. Respondent does not present any new arguments to warrant reconsideration.

Respondent lastly contends that my order should be set aside pursuant to Rule 60(b)(6) because of undue injury resulting from the order. I find that respondent's argument on this point is without merit, as the instances of prejudice cited by respondent do not rise to the level necessary to set aside a court order. In addition, I note that respondent presents no reason why he failed to raise these concerns at the permanent bar order hearing. I hold therefore that I will not entertain respondent's Rule 60(b) motion to reconsider.

Respondent's last contention is that my order be altered pursuant to Rule 59 in order to better reflect the court's intent and to prevent ambiguity. I find that the order accurately reflects the court's intent, and that it is

sufficiently clear. I hold therefore, that I will not consider respondent's Rule 59 motion to alter my order.

IT IS HEREBY ORDERED that this court will not consider respondent's motion based on Rules 60(b) and 59.

DATED: 11/15/94

/s/ Judith N. Keep
JUDITH N. KEEP, Chief Judge
United States District Court

cc: Michael L. Kirby
Post Kirby Noonan & Sweat
600 West Broadway, Suite 1100
San Diego, CA 92101-3355

Christopher L. Burton
Jones, Waldo, Holbrook & McDonough
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, UT 84101

David L. Sanders
Law Offices of David L. Sanders
400 East, 425 South
Salt Lake City, UT 84111

R. Priya Seshachari
Taft Securities Litigation, Inc.
79 "A" Street, Suite 106
Salt Lake City, UT 84103

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
WESTERN REGION

DAVID BENNETT, Plaintiff, vs. THOMAS BOLOGNA, et al., Defendants.	Case No. 90-1183-K(POR) San Diego, California Tuesday, September 6, 1994

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JUDITH N. KEEP
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff Bennett:

DAVID L. SANDERS, ESQ.
400 East 425 South
Salt Lake City, Utah 84111

R. PRIYA SESHACHARI, ESQ.
Taft Securities Lit., Inc.
79 A Street, Suite 106
Salt Lake City, Utah 84103

For all Plaintiffs, exclusive of Bennett:

MICHAEL L. KIRBY, ESQ.
Post, Kirby, Noonan and Sweat
600 West Broadway, Suite 1100
San Diego, California 92101
(619) 231-8666

CHRISTOPHER L. BURTON, ESQ.
JAMES W. PETERS, ESQ.
Jones, Waldo, Holbrook & McDonough
Salt Lake City, Utah

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

APPEARANCES: (Cont'd.)

For Defendants Bologna, Adams, Birndorf, Burnham, Byers, Hale, Hartman, Sarett and Kohne	ROBIN WERNER, ESQ. Brobeck, Phleger & Harrison 550 West C Street, Suite 1300 San Diego, California 92101
Court Recorder:	Renee Green Clerk's Office United States District Court 940 Front Street San Diego, California 92189
Transcription Service:	Peggy Schuerger Ad Hoc Reporting 121 Broadway, Suite 633 San Diego, California 92101 (619) 236-9325

[p. 1] SAN DIEGO, CALIFORNIA
TUESDAY, SEPTEMBER 6, 1994

(Call to order of the Court.)

MR. SANDERS: Dave Sanders, your Honor, for Mr. Bennett.

MS. SESHACHARI: R. Priya Seshachari also for Mr. Bennett.

MR. KIRBY: Good morning, your Honor. Michael Kirby for the moving parties.

MR. BURTON: Your Honor, Christopher L. Burton for the moving parties.

MS. WERNER: Robin Werner for the individual Defendants.

MR. PETERS: Jim Peters, your Honor, for the moving parties.

MR. KIRBY: Your Honor, also present is Mr. Baucom.

THE COURT: Good morning. This is a motion by the Plaintiff class counsel for a temporary or permanent bar order. I should say that procedurally I realize that the Court got here by a somewhat indirect mechanism and I'd like to state that — what happened for the record and then see if counsel have anything they want to add to the papers.

Essentially, as I understand it, this was a Judge Gilliam case. He did sign an order referring the matter of settlement to the magistrate judge as well as to affirm the [p. 2] settlement that was arrived at, the class action hearings, and the magistrate judge did in fact hold hearings and affirm the settlement in the case.

When the issue of this — this particular lawsuit came up, by virtue of the order that Judge Porter had signed — I mean, Judge Gilliam had signed referring the matter to Judge Porter — there was a reasonable interpretation that this matter could also be heard by Judge — Magistrate Judge Porter.

But out of an abundance of caution, and particularly since she felt that there may be a question as to whether or not the referral of Judge Gilliam covered this action, or covered this matter, she basically called and requested that a judge be drawn, thinking that since Judge Gilliam

is on disability that there could be a question of her jurisdiction and so I was drawn and that's why I am here.

MR. KIRBY: Thank you, your Honor. That renders moot all of the arguments that were made about the jurisdiction of a magistrate to enter this order.

THE COURT: Right.

MR. KIRBY: As the Court knows — and I'll address the amended memorandum — we filed, in accordance with the briefing schedule, our replies and then after that the Plaintiff — excuse me — Mr. Bennett filed an amended memorandum and an amended declaration for the Court which we

* * *

[p. 5] MR. SANDERS: Your Honor, the bar order sought to have him not be able to bring into contention in his state action the sufficiency of fairness of the settlement.

THE COURT: Why should he be allowed to bring that in?

MR. SANDERS: Because he was never allowed to speak to the sufficiency or the fairness.

THE COURT: Yeah, but, I mean, what would that have to do — what does he want to bring? An individual claim?

MR. SANDERS: He wants to bring a lawsuit against Jones, Waldo for breach of their fiduciary relationship to him and —

THE COURT: When he opted out of a class?

MR. SANDERS: Pardon?

THE COURT: When he opted out?

MR. SANDERS: Yes. He went to Jones, Waldo. He is the one that brought this suit to them.

THE COURT: Okay. So he basically wants to bring a personal lawsuit?

MR. SANDERS: Exactly.

THE COURT: For breach of fiduciary duty?

MR. SANDERS: Among other things. Yes.

THE COURT: What are the other things?

MR. SANDERS: Well, for intentional infliction of emotional distress, basically abuse of him as their client.

[p. 6] THE COURT: So he does in fact agree that he should be permanently barred from — or he does stipulate to not — to being barred from trying to bring a class action?

MR. SANDERS: Yes. He does not intend to bring a class action.

THE COURT: So is there any reason I shouldn't permanently bar him from same? Since there's a certain -- there's a certain concern that they have that he's kind of a loose cannon.

MR. SANDERS: I know that. And they would like to have you believe that, too, because he is the —

THE COURT: Okay. So but I'm saying if it's a no harm, no foul, why not allay everybody's concerns?

MR. SANDERS: Excuse me just a moment. If I might, your Honor?

THE COURT: Sure.

(Pause.)

MR. SANDERS: Your Honor, there's no intention on his part to file a class action or to overturn this judgment. What he wants to do is he wants to file a personal lawsuit against the attorneys that he had hired and made a deal with and who then pushed him aside.

What he wants to do is he would want to bring up the fact that the judgment, or the settlement that was arrived in this case, was certainly not adequate, but not because he

* * *

[p. 11] can do is make an order as to what claims for damages he can't pursue because they are encompassed by this court's orders.

And that's — I think her order is very clear, your Honor, as to what he can do and can't do and he's not precluded.

THE COURT: Read her order again in the record.

MR. KIRBY: Your Honor, the — he cannot bring claims which — " . . . damage claims which involve the sufficiency or fairness of the class action settlement, the competency of class counsel and counsel's services on behalf of the class, the award of fees and costs to class counsel from the class action settlement fund, the award

of additional compensation to any of the named plaintiffs. This order does not bar or restrain David D. Bennett from pursuing solely his own individual claims a former Gen-Probe shareholder, except to the extent that such claims have been previously adjudicated by this court."

I think it covers it, your Honor. He can file his individual lawsuit.

THE COURT: What's wrong with that?

MR. SANDERS: Because, as counsel says, it does cover it. The essence of his lawsuit is —

THE COURT: No, but do you agree then that that order should control?

MR. SANDERS: No. I don't.

[p. 12] THE COURT: Why?

MR. SANDERS: Because the essence of his lawsuit against his former attorney is that the settlement was unfair. He never was heard. He never got a chance to put on evidence. In fact, no one at that hearing put on evidence of fairness. There was — there was none whatsoever.

Mr. Kirby indicated to the Court —

THE COURT: But settlement was unfair is not his issue unless it's just as to him.

MR. SANDERS: That's correct. He asked his lawyers to do something different than they did. They refused to — to take him into consideration. They pushed him in a corner. They settled the case over his objections. He had to opt out. He wasn't even a party to —

THE COURT: But he can get his own damages.

MR. SANDERS: That's right. But in getting those damages, he does have to show the court in Utah that the settlement in this case was unfair.

THE COURT: Well, maybe or maybe not. I mean, that would be an issue for the Utah judge to decide what is or is not relevant on the issue of his own damages.

But when you listen to the language the Judge Porter has signed there, what is wrong with that?

MR. SANDERS: Well, because they indicate that he can't — as I mentioned, can't discuss the fairness of

* * *

[p. 17] going to get our millions and we're going to settle this. He is ripped off.

He goes and he files this suit. He asks Jones, Waldo to assist him. Apparently Jones, Waldo asked Mr. Kirby to assist them and the suit begins. But no one does any discovery. There was one and a half depositions taken by the Plaintiff in this case. No expert was retained. The only evidence of any of that happening was Mr. Kirby said he talked to someone unnamed. We don't know what he said. And Mr. Kirby reported that this unnamed person had said something.

Now, my client knows what the value of this case is. No one else does and no one will listen to him. And they've got a nice little settlement here. Everybody agrees, Let's do this for $6 million. The Japanese are overjoyed because they're getting such a bargain.

THE COURT: But, you see, that's his point about he can't have it both ways and he can't. If he wants to stay part of the class and object and draw to the attention of the judge that, I'm a class member and I object and I know and bring the evidence before the court as to why it's unfair, that's fine. But he opts out.

So to say he doesn't like the fact that there's only one and a half depositions and stuff, tough. He opted out. He had a choice to stay or a choice to opt out. But to say, I'm going to opt out and then challenge the whole way that [p. 18] everybody did it, he's outta there. That's gone.

That is a consequence of opt out. And he is in fact, from your statement to me, trying to have it both ways and he cannot.

MR. SANDERS: Actually, your Honor, I think it's the other way. The Defendants here, or the proponents of this bar order, are trying to have it both ways, and that is to muzzle him at the fairness hearings, to not allow him to have the opportunity to say anything, to not give any objections.

THE COURT: He doesn't have standing.

MR. SANDERS: That's right.

THE COURT: He does not have standing. If you're going to opt out, then to get up and say, This is unfair — and actually I read that transcript and that did happen at the beginning but then Judge Porter — he had filed his objections and then later she changed her mind and said, All right. I'll hear from you, and your client refused.

But the bottom line is as far as I'm concerned, from listening to all of this, I at this point affirm the order of Magistrate Judge Porter and say that that is the order that governs in this particular case. He has a right to pursue his individual claims, but I'm certain that if he pursues them, some trial judge is going to have this incredible scope hearing, but that's going to be another issue.

He is not able to purport in any way, shape, or form [p. 19] to re-litigate this class action.

MR. SANDERS: Well, it's not a matter of re-litigating. It's a matter of litigating.

THE COURT: Of litigating. He's not allowed to. That I adopt her order.

MR. SANDERS: Thank you.

MR. KIRBY: Your Honor, I'll prepare an order and submit it to counsel.

THE COURT: All right. Thank you.

MR. KIRBY: Thank you.

Proceedings recessed.)

I certify, under penalty of perjury, that the foregoing is a verbatim transcription prepared from the electronic sound recording of the proceedings provided to me, and that said transcription is a true and accurate transcript to the best of my ability and belief.

/s/ Peggy Schuerger — Transcriber

October 28, 1994 — Date

APPENDIX C

ORIGINAL

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID D. BENNETT, Plaintiff-Appellant, v. THOMAS H. BOLOGNA, et al, Defendant, and LAW FIRM OF JONES, WALDO, HOLBROOK & MCDONOUGH, Appellee.	No. 95-55306 D.C.No. CV-90-01183-JNK (Southern California) ORDER (Filed Jul. 30, 1996)

Before: SCHROEDER, LEAVY, Circuit Judges and TRIMBLE* District Court Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has

---

*Honorable James T. Trimble, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

U.S. Const. Art. III

Section 1. [Judicial power.]

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their continuance in Office.

U.S. Const. Amend I

Congress shall make no law . . . abridging the freedom of speech, or of the press; or . . . to petition the Government for a redress of grievances.

U.S. Const. Amend V

No person shall be . . . deprived of life, liberty, or property, without due process of law.

28 U.S.C. § 636

Jurisdiction, powers, and temporary assignment

(b)(1) Notwithstanding any provision of law to the contrary –

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings,

for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement. (Footnote omitted.)

28 U.S.C. § 1254

Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal

case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1367

Supplemental Jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

28 U.S.C. § 1651

Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 2283

Stay Of State Court Proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court, except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

CIRCUIT RULE 36-1

OPINIONS, MEMORANDA, ORDERS; PUBLICATION

Each written disposition of a matter before this Court shall bear under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER. A written, reasoned disposition of a case or motion which is designated as an opinion under Circuit Rule 36-2 is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written, reasoned disposition of a case or a motion which is not intended for publication under Circuit Rule 36-2 is a MEMORANDUM. Any other disposition of a matter before the Court is an ORDER. A memorandum or order shall not identify its author, nor shall it be designated "Per Curiam."

All opinions are published; no memoranda are published; orders are not published except by order of the court. As used in this rule, the term PUBLICATION means to make a disposition available to legal publishing companies to be reported and cited.

CIRCUIT RULE 36-2

CRITERIA FOR PUBLICATION

A written, reasoned disposition shall be designated as an OPINION only if it:

(a) Establishes, alters, modifies or clarifies a rule of law, or

(b) Calls attention to a rule of law which appears to have been generally overlooked, or

(c) Criticizes existing law, or

(d) Involves a legal or factual issue of unique interest or substantial public importance, or

(e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or

(f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or

(g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression.

CIRCUIT RULE 36-3
OTHER DISPOSITIONS

Any disposition that is not an opinion or an order designated for publication under Circuit Rule 36-5 shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

APPENDIX E

April 13, 1995

Honorable Judge Judith N. Keep
United States District Court
Southern District of California
940 Front Street, Suite 1160
San Diego, California 92189

Re: *Bennett v. Gen-Probe,* Civil No. 90-1183 K

Dear Honorable Judge Keep:

No authorization was given by me to bring any action in my name, individually or as a named plaintiff for a class, against David D. Bennett, especially for the purpose of seeking a Temporary Bar Order, a Permanent Bar Order or the enforcement of the same.

I demand the immediate termination of any effort made for the purpose of seeking or enforcing any Temporary Bar Order or Permanent Bar Order against David Bennett in my name.

I further demand the immediate termination of any and all actions by the following attorneys purporting to act in my name:

> Christopher L. Burton, Sidney G. Baucom and James W. Peters of Jones, Waldo, Holbrook & McDonough, as well as the lawyers acting as agents for Jones Waldo in California including Michael L. Kirby, James R. Lance, and Jeffery P. Lendrum of Post, Kirby, Noonan & Sweat.

Thank you for your prompt consideration of this matter.

Respectfully,

/s/ Alice Liu

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
WESTERN REGION

DAVID D. BENNETT, et al.,
Plaintiffs,
vs.
THOMAS H. BOLOGNA, et al.,
Defendants.

Case No. 90-1183-K(POR)

San Diego, California
Monday, May 1, 1995

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JUDITH N. KEEP
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff Bennett:

DAVID L. SANDERS, ESQ.
400 East 425 South
Salt Lake City, Utah 84111

R. PRIYA SESHACHARI, ESQ.
Taft Securities Ltd., Inc.
79 A Street, Suite 106
Salt Lake City, Utah 84103

For all Plaintiffs, exclusive of Bennett:	MICHAEL L. KIRBY, ESQ. Post, Kirby, Noonan and Sweat 600 West Broadway, Suite 1100 San Diego, California 92101 (619) 231-8666
	JAMES W. PETERS, ESQ. Jones, Waldo, Holbrook & McDonough Salt Lake City, Utah
For Defendants:	(No Appearance)

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

* * *

[p. 3] not have class claims and his only individual claims are those that can be pursued but not for compensation.

We've cited, your Honor, even in the reply – there are issues about he spent a thousand hours. I think the answer is to make him re-file a complaint in compliance with the Court's bar order.

Thank you, your Honor. If the Court has any questions, I'd be happy to respond.

MS. SESHACHARI: Thank you, your Honor. My client is gone. I thought he – he's under the impression this is the fourth case of the civil – under the civil calendar. So, anyway, I'm a little hesitant to start without him, but I'll have to continue.

Your Honor, there's been an important development about which this Court should be notified. I was just given these letters the night before from all of the eight named Plaintiffs, who all state unequivocally that – including the two named Plaintiffs that authorized the – ratified the *Bennett v. Bologna* settlement, but they were not aware of this proceeding that was brought on behalf – on behalf of them purportedly. They did not give authorization to Jones, Waldo and to Mr. Kirby to bring this bar proceeding and they are outraged –

THE COURT: If you think that your client is going to represent a class, you are definitely going to have him [p. 4] held in contempt.

MS. SESHACHARI: I'm sorry?

THE COURT: If you think your client is going to represent a class, he will in fact be held in contempt.

MS. SESHACHARI: No, your Honor. We're not – we're not attempting to represent the class. They're – the named Plaintiffs are stating that Mr. Kirby and Jones, Waldo have brought this proceeding without their knowledge and they have not ratified it. So what I'm requesting, your Honor, is that –

THE COURT: So what? So what?

MS. SESHACHARI: On oral motion, I'm requesting that under Federal Rule of Civil Procedure 17, that the caption be changed to reflect the real parties in interest to be Jones, Waldo versus –

THE COURT: I'm not doing this at this moment. You didn't give notice. And if these people are late, –

MS. SESHACHARI: Yes. I –

THE COURT: – that's tough. Look, –

MS. SESHACHARI: I'm aware of that, your Honor.

THE COURT: – this is the most –

MS. SESHACHARI: We just got this –

THE COURT: – ridiculous lawsuit I have ever seen. Your client is, frankly, an incredibly litigious person who is pushing –

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
WESTERN REGION

DAVID D. BENNETT, et al., Plaintiffs, vs. THOMAS H. BOLOGNA, et al., Defendants.	Case No. 90-1183-K(POR) San Diego, California Thursday, January 11, 1996 8:15 a.m.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JUDITH N. KEEP
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiff Bennett:

DAVID L. SANDERS, ESQ.
400 East 425 South
Salt Lake City, Utah 84111

R. PRIYA SESHACHARI, ESQ.
1200 Clay, Suite 15
San Francisco, California 94108

For all Plaintiffs, exclusive of Bennett:	MICHAEL L. KIRBY, ESQ. Post, Kirby, Noonan and Sweat 600 West Broadway, Suite 1100 San Diego, California 92101 (619) 231-8666
	JAMES LOWERY, ESQ. Jones, Waldo, Holbrook & McDonough Salt Lake City, Utah
For Defendants:	(No Appearance)

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

Court Recorder:	Renee Green Clerk's Office United States District Court 940 Front Street San Diego, California 92189
Transcription Service:	Peggy Schuerger Ad Hoc Reporting 121 Broadway, Suite 633 San Diego, California 92101 (619) 236-9325

* * *

[p. 16] make this ruling today. The legal profession is under attack and personally I think that most of the attacks under which it's ongoing are unwarranted.

Every day I see lawyers in this courtroom who work so hard and so diligently and so professionally and so often at not the great fees that are often represented in articles or stories. And it's a great pleasure to be a judge watching professionals as they work. But, unfortunately, this has not been such a case.

Class counsel in the *Gen Probe* class action, Jones, Waldo, Holbrook & McDonough and Attorney Burton bring this motion for contempt for violation of the permanent bar order and for sanctions. Former lead Plaintiff in the *Gen Probe* class action, Bennett, opposes. Class counsel brings the motion against Bennett and his attorneys.

Mr. Bennett was lead Plaintiff in the *Gen Probe* class action. After a proposed settlement was reached, Mr. Bennett refused to sign the stipulation of settlement. He objected, he claimed, to class counsel's handling of the case.

In May 1992, Mr. Bennett sent letters to other named Plaintiffs alleging class counsel's incompetence and unethical conduct. In a letter dated August 13, 1992, Mr. Bennett opted out of the class alleging unethical conduct by class counsel.

* * *

[p. 35] has to be vigilant about protecting its orders and the only way that I can know someone is trying to subvert an order is if class counsel would draw it to my attention.

Finally, Mr. Bennett argues that the Utah lawyers and their California agents, when commencing the present enforcement proceedings in California by a new motion,

using the caption of a concluded case, not a complaint, had neither in personam jurisdiction over him nor supplemental subject matter jurisdiction. Opp. at 18 and 19.

This argument is without merit. An opposing party does not need or exercise jurisdiction over Mr. Bennett. Rather, it is the court that exercises jurisdiction over parties. Thus, Mr. Bennett's argument that class counsel cannot pursue the instant motion because class counsel lacks jurisdiction over him I hold is meritless.

Last year, the Supreme Court decided – in 1994 – *Kokkonen v. Guardian Life Insurance Company*, 114 Sup.Ct. 1673.

There, the court held that:

> "Federal courts do not have inherent or ancillary jurisdiction to enforce a settlement agreement simply because the subject of that settlement agreement was federal." *Id.* at 1676-77.

The Court must retain jurisdiction over the settlement. However, I – and I'm going into this because it [p. 36] wasn't briefed, but I wasn't quite sure on the jurisdictional attack if this was what was meant – I do not find that *Kokkonen* bears on this case because, here, the Court issued a bar order. Bennett is being – and that is a final order. It was not appealed. It is final.

Bennett is being held in contempt of the bar order, not of a settlement agreement, and the Court is perfectly able to issue orders, such as a bar order, to protect its previous orders.

> "The third exception to the Anti-Injunction Act permits federal courts to enjoin state court proceedings to protect the res judicata effect of their judgments." See *Golden v. Pacific Maritime Association*, 786 F.2d 1425, 1427.

Thus, I hold that this Court has jurisdiction to hold Mr. Bennett in contempt of the permanent bar orders.

In sum, having considered all of the materials that have been submitted, I do in fact hold that Mr. Bennett is in fact in contempt, and I do then find that it is appropriate to award class counsel the costs of briefing and arguing this motion.

However, from the exhibits that were submitted regarding legal fees, it's unclear the amount of fees that were generated both to get this injunction in Utah and then to have this hearing. That is what I feel is covered by the

* * *

[p. 38] Southern District of California and they would be deposited in the National Registry with the United States Treasury.

I will then direct that counsel for the class draft a brief, bottom-line order, incorporated this oral ruling by reference.

Can you do that – how long?

MR. KIRBY: Your Honor, I can have that within three days.

THE COURT: All right. And then I'll give opposing counsel five days to object to the form of that order.

If there's an objection, I'll draft the order I find that's appropriate. If no objection, I'll sign the one that's submitted.

So saying, however, I would also point out that this oral ruling starts today. The 30 days from today are the time to comply with the complaint in Utah. I'm directing counsel for the class to file with Judge Medley in Utah, as I've indicated, a copy of the transcript. I will order the transcript to be made to be given to Judge Medley in Utah so that he is clear that I am not allowing or saying that the State of Utah has a right to attack the settlement agreement or class counsel's representation or any of the other allegations that I find violate a final judgment of the federal district court.

I'm also going to – and that's it.

* * *

TABLE OF CONTENTS

SECTION ONE: INTRODUCTION..... 1

SECTION TWO: REAL PARTIES IN INTEREST..... 1

SECTION THREE: JURISDICTION 2

SECTION FOUR: STATEMENT OF ISSUES ON APPEAL 3

A. Language of Temporary Bar Order on Appeal and issues which flow from language.. 4

B. Language of Order of November 15, 1994 and issues which flow from language..... 6

SECTION FIVE: STATEMENT OF THE CASE 8

A. A Brief History of Appellee Law Firm's Relationship to Appellant in Underlying Federal Class Action Case of *Bennett v. Bologna* 8

B. Law Firm Actively Discredited its Own Client to the Federal Court While Purporting to Respondent Client..... 9

C. Federal Court Authorized Stipulation of Settlement Which Excluded Mr. Bennett from the Jurisdiction of the Court and from the effects of the judgment..... 9

D. Law Firm Engaged in Abusive Post-Settlement Proceedings against Client to Avoid Utah State Malpractice and Breach of Contract Lawsuit 10

E. Appellant Filed Utah State Malpractice Complaint and Breach of Contract Complaint Against Law Firm in 1994, and was Enjoined by Federal Court from Bringing Certain Claims in State Court under Estoppel-Preclusion Theory 12

SECTION SIX: ARGUMENT 13

I. The Temporary and Permanent Injunctions ("Bar Orders") are Void For Overbroad Language in Paragraph 1 13

I(a). District Court abused its discretion when it issued injunctions purporting to limit or preclude Appellant Bennett's rights as an opt out from the *Bologna* case 14

I(b). District Court abused its discretion in applying preclusion theory against Appellant Bennett 16

I(c). District Court abused its discretion when it issued injunction in violation of Anti-Injunction Act 19

I(d). District Court abused its discretion in wielding jurisdiction over Appellant's attorneys who had not consented to court's jurisdiction and who are not even properly named in injunction 22

II. Temporary Bar Order Is Void Because Paragraph 2 Is Unconstitutionally Overbroad And Vague 23

II(a). District court abused its discretion by qualifying, in an improper and misleading way, Appellant's unfettered right to bring individual claims 23

II(b). District court abused its discretion when it issued a temporary injunction where the two paragraphs of the injunction were contradictory, and where the preclusive of Paragraph 1 could impinge on the rights assured to Appellant in Paragraph 2 25

II(c). Federal District Court abused discretion when it refused to alter or amend language of the temporary injunction (which was affirmed verbatim into a permanent injunction), despite two separate motions by Appellant requesting clarification or amendment of the ambiguities 27

II(d). If Temporary Bar Order is void, Permanent Injunction which wholly adopted temporary bar order is also void by implication 24

III. Federal District Court abused its discretion in issuing the void Temporary and Permanent Bar Orders Because court has limited jurisdiction which does not extend to Appellant's Claims .. 29

Bennett..... 25

III(a). Federal court abused discretion in asserting personal or subject matter jurisdiction over Appellant's independent claims 29

III(b). Federal district court may not assert jurisdiction over Appellant's state claims through principles of Ancillary and/or Pendent Jursidiction..... 30

IV. District Court abused discretion when it denied Appellant's Motion to Reconsider the issuance of injunction due to court's mistake of ex parte issuance..... 31

IV(a). District Court abused its discretion by issuing ex parte injunction without ordering Appellee to give notice order to Appellant... 32

IV(b). District Court abused its discretion when it issued ex parte injunction without demonstration of irreparable harm by Movant-Appellee 34

IV(c). District Court abused its discretion when it issued ex parte injunction without requiring Appellee to post a bond 36

IV(d). District Court abused its discretion in issuing ex parte Temporary Order without an evidentiary hearing, and without Appellant's knowledge of or ability to defend against its issuance 37

SECTION SEVEN: CONCLUSION 33

(3)

Supreme Court, U.S.
FILED
JAN 21 1997
CLERK

No. 96-678

In The

Supreme Court of the United States

October Term, 1996

DAVID D. BENNETT,

Petitioner,

v.

LAW FIRM OF JONES, WALDO, HOLBROOK & McDONOUGH and CHRISTOPHER L. BURTON,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

DALE F. GARDINER
Counsel of Record
PATRICIA A. O'RORKE
O'RORKE & GARDINER, LLC
6995 Union Park Center,
Suite 470
Midvale, Utah 84047
Telephone: (801) 569-3131

R. PRIYA SESHACHARI
TAFT SECURITIES LITIGATION
1200 Clay Street, Suite 15
San Francisco, California
94108
Telephone: (415) 922-1832

Counsel for Petitioner
David D. Bennett

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

18 pp

TABLE OF CONTENTS

Page

I. SUMMARY OF ARGUMENT 1

II. ARGUMENT 3

A. Whether A Federal Class Action Court Has Jurisdiction To Enter And Maintain A "Bar Order" Injunction Over An Opt Out's Malpractice Claims Against His Former Lawyers Is A Compelling Federal Question That Should Be Decided By This Court 3

1. The Basis For Federal Jurisdiction Urged By The Utah Lawyers Has Never Before Been Applied To A Class Opt Out And His Individual Claims 3

2. An Opt Out's Legal Malpractice Claims Do Not And Cannot Undermine A Class Settlement Judgment 4

3. The Ninth Circuit Court's Unpublished Memorandum Decision Does Not Conform With The Anti-Injunction Act 7

4. A Continuing Controversy Exists Because Mr. Bennett Is Not Free Of The Bar Order And The Class Court's Continuing Claim of Jurisdiction 7

B. The Unpublished Memorandum Disposition Of The Ninth Circuit Court Calls For Supervisory Review Of This Court Because: (1) The Memorandum Disposition Ignores Inherent Constitutional And Jurisdictional Issues Created By A District Court's Policing Of An Opt Out; (2) Accommodates District Court Errors, Mistakes And Misconduct; And (3) Is In Conflict With A Contemporaneously Published Decision Of Another Panel Of The Ninth Circuit 9

III. CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Atlantic Coastline R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970) 7

Durkin v. Shea & Gould, 92 F.3d 1510 (9th Cir. 1996) 5, 8, 10

Hansberry v. Lee, 311 U.S. 32 (1940) 4

In Re Corrugated Antitrust Litig., 756 F.2d 411 (5th Cir. 1985) 7

N.L.R.B. v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 2

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).. 2, 3, 4

Silicon Gel Breast Implant Prods. Liab. Litig., (N.D. Ala. (C.V. 92-10005)) 2

Wiener v. United States, 357 U.S. 349 (1958) 1

STATUTES

28 U.S.C. § 636 9

OTHER AUTHORITIES

Millions For Us, Nothing For You, N.Y. TIMES, Dec. 19, 1993, § 3, at 1 2

NEWBERG ON CLASS ACTIONS §§ 15.27, 15.31 (3d ed. 1992) 2

RULES

Fed.R.Civ.P. 23 ..... 2, 3

Fed.R.Civ.P. 65 9

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. 1 1

U.S. CONST. amend. 5 1

U.S. CONST. art. III 1, 8

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States. Petitioner David D. Bennett respectfully submits this reply brief in support of his Petition for Certiorari to review an unpublished Memorandum disposition of the Court of Appeals for the Ninth Circuit. The unpublished Memorandum "Affirmed as Construed" the power of a federal district court first to bar and then continue to restrict an opt out in bringing unlitigated claims against his former lawyers who also served as class counsel. The Affirmance implicitly empowered the federal court to police Mr. Bennett such that the Utah "litigation does not undermine [the] finality of [the] class action judgment." (App. 4.) The Memorandum also stated that the Utah court may examine the adequacy of the class settlement only insofar as the settlement sheds light on the Utah Lawyers' representation of Bennett. (App. 3.)

I. SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals' affirmance of a federal district class court's jurisdiction over an opt out, raises compelling constitutional questions under the Fifth Amendment Due Process Clause, the First Amendment Free Speech and Redress Clause, and the Article III Case or Controversy Clause.[1] Yet, those questions were not directly addressed in the Respondents' (hereinafter "Utah Lawyers") Brief in Opposition to certiorari. Their failure to address the important constitutional and federal questions is a concession that the issues are substantial and warrant certiorari. *C.f. Wiener v. United States*, 357 U.S. 349, 351 n.* (1958). Further, the Utah Lawyers' and the lower court's misapplication of ancillary jurisdiction concepts to an opt out's unlitigated

[1] *See* Petition for Certiorari, pp. 10-15.

malpractice claims is itself sufficient to warrant certiorari.[2] Bringing a malpractice claim does not undermine the earlier class settlement and does not trigger ancillary federal jurisdiction.

Class actions and class action settlements are burgeoning[3] and so are abuses committed by lawyers ostensibly representing the class, but who fashion settlements primarily in their own self interests.[4] Until the case at bar, Rule 23(b)(3) individual class members were protected by Due Process and Rule 23(c)(2). Individual plaintiffs could either litigate the fairness of the settlement in the class action court,[5] or, as Mr. Bennett did, timely opt out and be free of the federal court entirely. Indeed, this concept of the right to opt out serves as the Due Process foundation for allowing class judgments to bind absent class members. *E.g., Phillips Petroleum Co. v.*

---

[2] In determining whether sufficient reasons exist for granting certiorari, the United States Supreme Court focuses on whether the presented issues are of importance to the public as distinguished from the individual concerns of the litigants. *E.G., N.L.R.B. v. Pittsburgh S.S. Co.,* 340 U.S. 498, 502 (1951).

[3] An example is the $4,225,070,000 proposed settlement in the *Silicon Gel Breast Implant Pros. Liabl. Litig.,* (N.D. Ala. (C. V. 92-10005)). In this action, approximately 14,300 class plaintiffs opted out of the class settlement.

[4] *See generally,* NEWBERG ON CLASS ACTIONS §§ 15.27, 15.31 (3d ed. 1992); *Millions For Us, Nothing For You,* N.Y. TIMES, Dec. 19, 1993, § 3, at 1.

[5] Contrary to the Suggestions found in pp. 4-5 of the Utah Lawyers' Brief in Opposition, after Bennett opted out, the class court did not adjudicate Bennett's malpractice complaints against the lawyers. At the fairness hearing, Bennett testified, "I'm here today to clarify that I am opting out." When Bennett asked if he could speak, the court responded: "Well, you've opted out. You have no standing to object to the settlement." Bennett replied, "No, just that I expect nothing from the settlement." Transcript of proceedings, August 26, 1992, p. 4, Ins. 5-6; p. 7, Ins. 16-18, 20-21. He also explicitly told the court that he "will not be pursuing [his] objections in this [the class court] forum." *Id.* p. 17, Ins. 2-3.

Shutts, 472 U.S. 797, 808-813 (1985). As hereinafter demonstrated, the lower courts' conclusion and the Utah Lawyers' argument that an opt out's state court malpractice lawsuit could, in some unexplained way, undermine a class settlement and justify jurisdiction over an opt out, is unprecedented. The ultimate consequence is to render meaningless the right to opt out and thereby destroy the Due Process basis underlying a class judgment in Rule 23(b)(3) cases.

Finally, contrary to the Utah Lawyers' assertions, the federal courts' interference in the state court litigation is not over. And the errors committed below were not de minimus or corrected by the reviewing courts. For these reasons and the reasons in Mr. Bennett's petition, certiorari should be granted to resolve the questions presented for review.

II. ARGUMENT

A. Whether A Federal Class Action Court Has Jurisdiction To Enter And Maintain A "Bar Order" Injunction Over An Opt Out's Malpractice Claims Against His Former Lawyers Is A Compelling Federal Question That Should Be Decided By This Court.

1. The Basis For Federal Jurisdiction Urged By The Utah Lawyers Has Never Before Been Applied To A Class Opt Out And His Individual Claims.

In his Petition for Certiorari, Mr. Bennett challenges the lower court's jurisdiction to enter and a "Bar Order" and the circuit court's Memorandum disposition that "Affirmed," as construed the prohibition of a class opt out from "initiating or maintaining any lawsuit" against the opt out's former lawyers "which in any way involves . . . counsel's legal services."

There are no other cases that grant jurisdiction to a federal class action court over a securities class opt out to bar and police the opt out's pleading of malpractice claims

against the lawyers who fashioned the class settlement. Lack of authority upholding the Utah Lawyers' position is not surprising given the constitutional rationale for allowing class action judgment as enunciated by this Court in *Hansberry v. Lee*, 311 U.S. 32 (1940), and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *Hansberry* explained that the class action is an equity invention to enable courts to proceed to a decree where the number of those interested in the litigation are too great to permit joinder. Absent class members are bound by the decree only so long as the named parties adequately represent the absent members and all members of the class have the same interests. 311 U.S. at 41. The *Shutts* court subsequently held that "due process requires at a minimum" that class plaintiffs be allowed to opt out and be free of the class litigation entirely. 472 U.S. at 812.

The interest Mr. Bennett has in obtaining compensation for the Utah Lawyers' breach of their retainer agreement with him, malpractice committed as to him, and the infliction of emotional distress upon him, is different than the interest the securities class members had in obtaining compensation from the securities class defendants. For these and other reasons, Mr. Bennett opted out of the class. Therefore, Due Process requires: (1) That Mr. Bennett's individual claims against the Utah Lawyers not be thwarted by the class settlement judgment; and (2) that Mr. Bennett be free of the Bar Order and interference of the district court. But, if certiorari is not granted, this Court will not meet the lower court's *denial and challenge* of the Due Process basis for allowing class judgments.

2. An Opt Out's Legal Malpractice Claims Do Not And Cannot Undermine A Class Settlement Judgment.

Although the Utah Lawyers repeatedly say that Mr. Bennett undermines the class action settlement, they wholly fail to explain how his individual malpractice claims can possibly do so. Neither did the courts below. Both sides concede that opt outs have no standing to bring claims on behalf of the

class. But, upon the ex parte receipt from the Utah Lawyers of the "draft complaint" marked "for discussion purposes only," the court became alarmed that Mr. Bennett might bring a class action against the lawyers and entered a Bar Order. Further, even if Mr. Bennett had standing to bring a class action against the Utah Lawyers, the court incorrectly assumed that such a suit would undermine the class settlement judgment. The Ninth Circuit has conclusively ruled that in a class settlement, res judicata and collateral estoppel do not bar a subsequent class member's suit for malpractice. *Durkin v. Shea & Gould,* 92 F.3d 1510 (9th Cir. 1996). Malpractice claims against lawyers who fashion the class settlement do not undermine the settlement judgment.

Thereafter, when the court was told the draft complaint was only what it said it was, a draft for discussion, and that Mr. Bennett would not file a class action, the Temporary Bar Order should have been dissolved and the federal class court's lack of jurisdiction recognized. That did not happen. The Temporary Bar Order was adopted word-for-word as the permanent injunction even though the draft complaint was never made part of the record. Finally, when Mr. Bennett filed his state court complaint pleading individual claims only, the lower court's claim of jurisdiction over him should have ended. Instead, Mr. Bennett, a Utah resident, was hauled down before the California federal court and found in contempt. Incredibly, the court struck over 100 paragraphs of relevant facts from Mr. Bennett's malpractice complaint. On appeal of the Bar Order, the Ninth Circuit should have found that the lower court did not have jurisdiction to enter the Bar Order or to police Mr. Bennett's pleadings. Instead, it noted that courts have jurisdiction to protect their judgments, failed to explain how Mr. Bennett's claims undermined the judgment, and concluded without analysis that the federal court had jurisdiction. (App. 2-3.)

That Mr. Bennett's claims could not undermine the class settlement is also demonstrated by the fact that Mr. Bennett's individual state court claims were never litigated in the class

proceeding.[6] Prior to approval of the settlement, Mr. Bennett opted out. Three years later, he filed his malpractice complaint in a Utah state court. A copy of the prayer for relief in the complaint actually filed by Mr. Bennett, and for which he was found in contempt of the Bar Order at issue, is attached as App. 59. The complaint alleges the Utah Lawyers breached the retainer agreement *with him alone;* breached their fiduciary duty *to him alone*; and intentionally inflicted emotional distress *upon him alone.* These claims were never made by Mr. Bennett or anyone else in the class settlement proceedings, nor were Mr. Bennett's claims litigated. The "Class Action Final Judgment of Dismissal with Prejudice" does not mention any claims against the lawyers who fashioned the settlement. More importantly, as set forth in the final judgment itself, absolutely *no claims* were litigated or adjudicated by the settlement.

> 3. The Stipulation and Settlement are not an admission by Defendants nor is this judgment a finding of the validity of any claims in the litigation or of any wrongdoing by them.
>
> * * *
>
> [T]he stipulation . . . and any negotiations . . . related thereto . . . shall not be offered or received . . . in any court, administrative agency or other tribunal for any purpose whatsoever other

---

[6] Bennett's malpractice claims also are not resolved in the Utah State Bar proceedings. The Utah Lawyers devote two pages of their brief describing their view of the State Bar proceedings in an apparent attempt to discredit Mr. Bennett and his father and to suggest that Bennett's claims have been presented and ruled upon. The Utah Lawyers' continuing attempt to subvert the state court process is condemned in the "Scope" provisions of the Utah Rules of Professional Conduct. It reads, "Violation of a rule shall not give rise to a cause of action nor should it create any presumption. . . . The Rules [of Professional Conduct] are designed to provide guidance to lawyers and provide a structure for regulating conduct through discipline agencies. They are not designed to be a basis for civil liability. Further, *the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons."* (Emphasis added.)

> than to enforce the provisions of this judgment. . . . (App. 10.)

The judgment's instructions are consistent with overwhelming case law that a class settlement does not adjudicate claims. Res Judicata or collateral estoppel do not apply to opt outs. *E.g., In Re Corrugated Antitrust Litig.*, 756 F.2d 411, 418-19 (5th Cir. 1985); and see also the cases cited on page 16 of Mr. Bennett's Petition for Certiorari.

3. The Ninth Circuit Court's Unpublished Memorandum Decision Does Not Conform With The Anti-Injunction Act.

The Anti-Injunction Act should have barred the federal courts from claiming jurisdiction over Mr. Bennett and his individual claims. The Act "is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of the three specifically defined exceptions." *Atlantic Coastline R.R. v. Brotherhood of Locomotive Eng'rs,* 398 U.S. 281, 286 (1970). Because Mr. Bennett did not have class standing to attack the judgment and could not attack the class judgment, the district court had no jurisdiction or need "to protect or effectuate its judgments" as an exception to the Act. Consequently, the Ninth Circuit's unpublished decision does not conform to the Act.

4. A continuing Controversy Exists Because Mr. Bennett Is Not Free Of The Bar Order And The Class Court's Continuing Claim of Jurisdiction.

The Utah Lawyers wrongly claim that because Mr. Bennett is free to pursue his "individual claims," there is no Article III case or controversy for this Court to consider. At first glance, the assertion may appear correct. In affirming the Bar Order, the Ninth Circuit Panel held "that the Bar Order cannot be construed to prevent Mr. Bennett from litigating issues in his malpractice and breach of contract actions that relate to class counsels' handling of the class action, so long as such litigation does not undermine the finality of class

action judgment." Close examination reveals, however, that the Utah Lawyers used the Bar Order and will continue to use the Bar Order to prevent Mr. Bennett from litigating his individual claims and the issues of whether the lawyers obtained a good class settlement for Mr. Bennett and whether the Utah Lawyers competently represented Mr. Bennett while he was a client.

Crippling the Utah courts' examination of the fairness of the settlement or class counsels' behavior during the class proceedings obstructed Mr. Bennett's day in court, but assists the Utah Lawyers in wrongfully avoiding liabilities. Accordingly, the Utah Lawyers choose to consider Mr. Bennett bound by the Bar Order in a manner which *does* affect his right to pursue his individual claims in state court. In fact, at the insistence of the Utah Lawyers, the federal district court declared Mr. Bennett and his counsel in contempt for violating the Bar Order. The court stuck over 100 paragraphs of relevant facts alleging how the lawyers failed to adequately and reasonably represent Mr. Bennett. The foregoing occurred even though these issues, as they relate to Mr. Bennett's individual claims, were not litigated in the federal class action, and the district court should not prevent their litigation in a Utah state court. *See Durkin v. Shea & Gould,* 92 F.3d 1510, 1516-17 (9th Cir. 1996). But because of the lower courts' mistakes, Mr. Bennett has suffered, and continues to suffer, injury which can only be redressed by vacating the Bar Order. Thus, an Article III case or controversy will exist until the Bar Order is dissolved and the district court's role as a policeman over the state court litigation ends.

Furthermore, the Ninth Circuit erred in affirming the Bar Order regardless of how it construed the Bar Order. Accordingly, an Article III case or controversy exists as long as Mr. Bennett continues to be bound to *any* extent by the Bar Order.

B. The Unpublished Memorandum Disposition Of The Ninth Circuit Court Calls For Supervisory Review Of This Court Because: (1) The Memorandum Disposition Ignores Inherent Constitutional And Jurisdictional Issues Created By A District Court's Policing Of An Opt Out; (2) Accommodates District Court Errors, Mistakes And Misconduct; And (3) Is In Conflict With A Contemporaneously Published Decision Of Another Panel Of The Ninth Circuit.

The egregious errors committed below were not de minimus. No class member supported or authorized the Utah Lawyers' unnoticed ex parte actions and the lower court failed to comply with Rule 65 or 28 U.S.C. § 636(b)(1)(A) in issuing, years later, a Temporary Bar Order against an opt out in another state. As set forth in the Petition for Certiorari, these mistakes warranted de novo review by the Appellate Court. Instead, the Memorandum Disposition indicated no reflection on the inherent constitutional and jurisdictional issues. The Memorandum Disposition effectually countenanced the substantial misconduct below.[7]

---

[7] In a Motion to Supplement the Record filed with the Ninth Circuit Court of Appeals on August 12, 1995, respondents' counsel revealed: "This appeal concerns the propriety of a Permanent Bar Order prohibiting Appellant David D. Bennett, a former class member in the lower court, from suing class counsel over the fairness and adequacy of a court-approved class action settlement. Class counsel sought a Permanent Bar Order from the United States District Court for the Southern District of California on receipt of a draft of a complaint from David Bennett's Utah counsel. Class counsel did not file the draft complaint with the motion for a bar order but rather offered to provide the Court with a copy of the draft complaint for *in camera* inspection. Prior to the September 6, 1995 hearing on the Permanent Bar Order, Judge Judith N. Keen **requested** Class Counsel to provide her with a copy of the draft complaint, with which Class Counsel complied." Prior to this submission to the Ninth Circuit, the so-called "draft complaint" was not in any court record. It was never filed in a federal or state court.

If the Memorandum Disposition is allowed to stand, it is fundamentally contrary to *Durkin v. Shea & Gould,* 92 F.3d 1510, 1515 (9th Cir. 1996) ("[T]he prior adjudication of the adequacy of a settlement does not collaterally estop a settlement party's legal malpractice claim challenging of the conduct of a party's lawyer.").

III. CONCLUSION

The Respondents' failure to address the inherent and compelling constitutional and jurisdictional issues raised by the lower courts' affirmance of a Bar Order and jurisdiction over a class opt out justifies certiorari. The never-before-applied-to-an-opt-out ancillary jurisdiction urged by the Respondents is an issue qualifying for certiorari. The uncorrected departures from the normal course of judicial proceedings cries out for certiorari. For these reasons and the reasons in Mr. Bennett's petition, certiorari should be granted.

Respectfully submitted this 20 day of January, 1997.

DALE F. GARDINER,
Counsel of Record
PATRICIA A. O'RORKE
O'RORKE & GARDINER, LLC
6995 Union Park Center – Suite 470
Midvale, Utah 84047
Telephone: (801) 569-3131

R. PRIYA SESHACHARI
TAFT SECURITIES LITIGATION
1200 Clay Street – Suite 15
San Francisco, California 94108
Telephone: (415) 922-1832

Counsel for Petitioner
David D. Bennett

PARKER M. NIELSON (2413)
655 South 200 East
Salt Lake City, UT 84111
Telephone: (801) 532-1150
Attorney for Plaintiff

DRAFT: 5/5/94
(CONFIDENTIAL: not for publication or dissemination in any form – for discussion purposes only)

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY

STATE OF UTAH

DAVID D. BENNETT, for himself and for and on behalf of a class of persons consisting of all holders of the common stock of Gen-Probe Incorporated on October 27, 1989, as defined herein,

Plaintiff,

vs.

JONES, WALDO, HOLBROOK & McDONOUGH, P.C., a Utah corporation, SIDNEY G. BAUCOM and CHRISTOPHER L. BURTON,

Defendants.

COMPLAINT

(Jury Trial Demanded)

Civil No.

Judge

Counsel Submitting:

David L. Sanders, Esq. (USBN #6134)
LAW OFFICES OF DAVID L. SANDERS
400 East 425 South
Salt Lake City, Utah 84111
Telephone: (801) 530-0020
Telecopier: (801) 530-0024

R. Priya Seshachari, Esq. (USBN #6329)
TAFT SECURITIES LITIGATION, INC.
79 A Street, Suite 106
Salt Lake City, Utah 84103
Telephone: (801) 532-5669

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DAVID D. BENNETT, Plaintiff	:	PLAINTIFF'S SECOND AMENDED COMPLAINT
vs.	:	Civil No. 940908220
JONES, WALDO, HOLBROOK & MCDONOUGH, P.C.; and CHRISTOPHER L. BURTON, Defendants	:	(Jury Trial Requested) Judge: Tyrone E. Medley

COMES NOW PLAINTIFF David D. Bennett before this Honorable Court, represented by and through his counsel of record, David L. Sanders, Esq., of the Law Offices of David L. Sanders, and R. Priya Seshachari, Esq.

of Taft Securities Litigation, Inc., and complains of Defendants as follows:

* * *

with multiple-claim contract and tort claims as enunciated in *Crookston v. Fire Ins. Exchange,* 817 P.2d. 789 (Utah 1991) and 860 P.2d. 937 (Utah 1993; and in Section 78-18-1 of the Utah Code. The statutory premise provides for a punitive recovery when the clear "acts and omissions of the tortfeasor are the result of willful and malicious conduct" or it is "conduct that manifests knowing and reckless indifference toward, and a disregard of, the rights of others."

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for a jury trial of right in accordance with Rule 38 of the Utah Rules of Civil Procedure, and for the following relief:

1. A judgment declaring conduct of the Defendants to be in violation of law as set forth herein.

2. A judgment awarding Plaintiff compensation for his various contractual and tortious injuries and damages, and for mental and emotional distress inflicted on him as a result of the Defendants' breaches of contract, malpractice, breaches of attorney-client privilege, breach of fiduciary duties, abuse of process, malicious civil prosecution, wrongful enjoinder, and other unlawful conduct.

3. A judgment awarding Plaintiff exemplary punitive damages against each Defendant in accordance with Section 78-18-1 of the Utah Code and as a mandate

against client abuse and conflicting misrepresentation in the future.

4. A judgment awarding Plaintiff his counsels' fees and costs and expenses in accordance with Paragraph 19 of the Retainer Agreement with Jones, Waldo, Holbrook & McDonough and general law and equity.

5. A judgment awarding such other and further legal, equitable and declaratory relief as the Court deems just and proper.

DATED this 1st day of August, 1995.

Respectfully Submitted,

/s/ David L. Sanders
David L. Sanders, Esq.
LAW OFFICES OF DAVID L. SANDERS
400 East 425 South
Salt Lake City, Utah 84111
Telephone: (801) 530-0020
Telecopier: (801) 530-0024

/s/ R. Priya Seshachari
R. Priya Seshachari, Esq.
TAFT SECURITIES LITIGATION, INC.
79 A Street, Suite 106
Salt Lake City, Utah 84103
Telephone: (801) 532-5669

Attorneys for Plaintiff